

## ARTICLES

### **GONZALES V. RAICH: CONGRESSIONAL TYRANNY AND IRRELEVANCE IN THE WAR ON DRUGS**

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The legislative department is everywhere extending the sphere of its activities . . . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.<sup>1</sup>

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.<sup>2</sup>

It cannot be presumed that any clause in the constitution is intended to be without effect . . . .<sup>3</sup>

There is no U.S. Constitution any more when it comes to the drug war.<sup>4</sup>

#### I. INTRODUCTION

Diane Monson was a sick woman. A degenerative spinal disease caused her constant back pain. She had tried dozens of traditional medicines, but all had failed to ease her suffering. Finally, on her doctor's recommendation and under the authority of state law, she began cultivating six marijuana (cannabis) plants for her personal, medicinal use at home.

The U.S. government learned of Monson's activities, and on August 15, 2002, agents from the Drug Enforcement Agency (DEA) entered her home. Under the authority of federal law and the War on Drugs, they confiscated and destroyed Monson's six plants. Since the United States never prosecuted Monson as the felon that federal law and propaganda proclaim her to be, she and Angel Raich, another sick California woman using cannabis on a doctor's recommendation, brought suit to prevent future DEA raids. Although the Ninth Circuit

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<sup>1</sup> THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

<sup>2</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>3</sup> *Id.* at 174.

<sup>4</sup> Michael W. Lynch, *Battlefield Conversions*, REASON, Jan. 2002, at 36, 42 (quoting Michael Levine, former Drug Enforcement Administration, Customs Service, and Bureau of Alcohol, Tobacco and Firearms official).

Court of Appeals ruled in their favor,<sup>5</sup> the Supreme Court reversed, holding that Congress can criminalize the private possession and medicinal use of cannabis, even on a licensed physician's recommendation and under the protection of state law.<sup>6</sup>

*Raich* arises at the nexus of three sources of law. It began as a conflict, brewing for some time,<sup>7</sup> between state and federal legislation. The state law is Proposition 215, enacted by California ballot initiative in 1996 and codified as the Compassionate Use Act (CUA).<sup>8</sup> The CUA, under which appellants in *Raich* possessed and used marijuana, is intended

[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.<sup>9</sup>

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<sup>5</sup> See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>6</sup> *Raich*, 545 U.S. at 42. For other Compassionate Use Act (CUA)-related cases, see, for example, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497–98 (2001), which held that: (1) no implied medical necessity exception exists to prohibition of manufacture and distribution of marijuana established by Controlled Substances Act (CSA), and (2) the district court thus could not consider medical necessity when exercising its discretion to fashion injunctive relief. See also *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (permitting physicians to discuss medical prescription of marijuana); *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1205 (N.D. Cal. 2003) (addressing the constitutionality of the CSA); *Wo/Men's Alliance for Med. Marijuana v. United States*, No. 02-MC-7012 JF, 2002 WL 32174210, at \*2 (N.D. Cal. Sept. 24, 2002) (holding that hospice was not entitled to return of seized marijuana).

<sup>7</sup> As the Mayor of Santa Cruz had observed, "Clearly, state law and federal law are on a collision course." Christopher Krohn, *Why I'm Fighting Federal Drug Laws from City Hall*, N.Y. TIMES, Sept. 21, 2002, at A15. More recently, "Denver . . . became the first city in the nation to wipe out all criminal and civil penalties for adults caught possessing a small amount of marijuana." Stephanie Simon, *Denver Is First City to Legalize Small Amount of Pot*, L.A. TIMES, Nov. 3, 2005, at A10.

<sup>8</sup> Cal. Health & Safety Code § 11362.5 (West Supp. 2007). For background on Proposition 215, see ALAN BOCK, WAITING TO INHALE: THE POLITICS OF MEDICAL MARIJUANA (2000), and Robert J. MacCoun & Peter Reuter, *Drug War Heresies: Learning from Other Vices, Times, and Places*, in RAND STUDIES IN POLICY ANALYSIS 378, 378–80 (2001).

For background on federal and state responses to medical marijuana, see generally RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS chs. 1–3, 5–7 (2004); Lauryn P. Gouldin, *Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 475–82 (1999); Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1793–800 (2003); Alistair Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1586–89 (2000); Dennis Newitt, Comment, *The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws*, 4 J. LEGAL ADVOC. & PRAC. 156, 158–68 (2002). Every State that has voted on medical marijuana has legalized it. Ethan Nadelmann, *An End to Marijuana Prohibition: The Drive to Legalize Picks Up*, NAT'L REV., July 12, 2004, at 30.

<sup>9</sup> Cal. Health & Safety Code § 11362.5(b)(1)(A) (West Supp. 2007).

The federal law, enacted in 1970, is the Comprehensive Drug Prevention and Control Act, popularly called the Controlled Substances Act (CSA).<sup>10</sup> The CSA classifies marijuana as a Schedule I controlled substance, which means that in Congress's view, it has a high potential for abuse, no officially accepted medicinal uses, and no safe level of use under medical supervision.<sup>11</sup> Thus, except for rare controlled experiments, federal law flatly prohibits the possession or use of even small quantities of marijuana.<sup>12</sup>

Under the Supremacy Clause of the Constitution,<sup>13</sup> federal law preempts contrary state law.<sup>14</sup> At the same time, Congress can act only within its constitutional powers. Among the most important of these is the power "[t]o regulate Commerce . . . among the several States,"<sup>15</sup> which Congress expressly relied upon in enacting the CSA.<sup>16</sup> For sixty years, this reliance was all that was required to justify federal power to enact the law in question.<sup>17</sup> Since 1995, however, the Supreme Court has established precedent striking down certain federal laws as beyond the power of Congress under the Commerce Clause.<sup>18</sup> Though federal law preempts contrary state law, it can do so only if the federal law is within Congress's power in the first place.<sup>19</sup> Constitutional law, specifically Commerce Clause jurisprudence, is thus the third and overarching source of law within which *Raich* had to be resolved.

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<sup>10</sup> 21 U.S.C. §§ 801–904 (2006).

<sup>11</sup> *Id.* § 812(b)(1). On the rest of the CSA scheduling system, see BOCK, *supra* note 8, at 223–24; Gouldin, *supra* note 8, at 477–78.

<sup>12</sup> In *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court ruled that there is no medical necessity exception to enforcement of the CSA. 532 U.S. 483, 498–99 (2001).

<sup>13</sup> U.S. CONST. art. VI, cl. 2.

<sup>14</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 159 (1991) (interpreting the Supremacy Clause to grant federal law power over conflicting state law); *Conant v. Walters*, 309 F.3d 629, 645–46 (9th Cir. 2002) (Kozinski, J., concurring) (discussing the implications of *New York* in cases concerning state medical marijuana statutes).

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>16</sup> See 21 U.S.C. § 801 (identifying Congress's jurisdictional basis for adopting the CSA); *Gonzales v. Raich*, 545 U.S. 1, 15 (2005) (discussing congressional authority to enact the CSA).

<sup>17</sup> See generally Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1257 (2003); Newbern, *supra* note 8, at 1600–05.

<sup>18</sup> See *United States v. Morrison*, 529 U.S. 598, 608–11 (2000) (holding the Violence Against Women Act unconstitutional because it exceeded Congress's Commerce Clause powers); *Jones v. United States*, 529 U.S. 848, 854–59 (2000) (discussing what activities qualify as "commerce"); *United States v. Lopez*, 514 U.S. 549, 559–84 (1995) (finding the federal Gun-Free School Zones Act unconstitutional because it exceeded Congress's Commerce Clause authority).

<sup>19</sup> As the Ninth Circuit notes, the Supreme Court in *Oakland Cannabis* "expressly reserved" the question whether the CSA exceeds Congress's power under the Commerce Clause. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003), *rev'd sub nom.* *Gonzales v. Raich*, 545 U.S. 1 (2005).

*Raich* is a landmark case that has already generated its first law review symposium.<sup>20</sup> It involves a unique mixture of opinions,<sup>21</sup> clauses,<sup>22</sup> cases,<sup>23</sup> and distinctions,<sup>24</sup> and is a major event in the 5000-year history of humanity's relationship with the cannabis plant.<sup>25</sup> It could be called the perfect storm of federalism, science, civil liberty, and the War on Drugs, and it has yielded some unusual alliances on the Supreme Court. Over the past generation, it is the Court's "conservatives" that have tended to rule against Congress in Commerce

<sup>20</sup> Symposium, *Federalism After Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 743 (2005).

<sup>21</sup> Justice Stevens, joined by Justices Kennedy, Souter, Ginsberg, and Breyer, delivered the opinion of the Court. *Raich*, 545 U.S. at 4. Justice Scalia filed a concurring opinion, Justice O'Connor filed a dissenting opinion joined by Justice Thomas and Chief Justice Rehnquist, and Justice Thomas filed a dissenting opinion. *Id.*

<sup>22</sup> Besides the Commerce Clause, the Supremacy Clause, the Tenth Amendment, and the Necessary and Proper Clause all play key roles in *Raich*. On the last, see Brannon P. Denning & Glenn H. Reynolds, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 923–26 (2005), for a discussion of the implications of *Raich* for Necessary and Proper Clause jurisprudence.

<sup>23</sup> See, e.g., *Morrison*, 529 U.S. at 608–11 (commenting upon the scope of Congress's Commerce Clause powers); *Lopez*, 514 U.S. at 559–84 (delineating the scope of Congress's Commerce Clause powers); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (stating the scope of Congress's Commerce Clause powers); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (noting the scope of Congress's Commerce Clause powers); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400–01 (1819) (discussing the scope of Congress's Commerce Clause powers). All figure prominently in *Raich*.

<sup>24</sup> Among others we shall consider, the distinctions between applied and facial challenges and the distinctions between medicinal and recreational cannabis use play important roles in *Raich*. On the prospects of facial challenges after *Raich*, see Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 770–76 (2005), for a discussion of the as-applied analysis, as opposed to the facial challenge at issue in *Raich*. See also Denning & Reynolds, *supra* note 22, at 916–18 (discussing the implications of *Raich* for the future of as-applied challenges to federal law).

<sup>25</sup> Records dating to 2800 B.C. show that man has found three broad uses for the cannabis plant—*medicinal*, *industrial* (commerce in hemp), and *recreational* (where religion, psychology, literature, sociology, crime, and race come more fully into play). See, e.g., EDWARD D. BLOOMQUIST, *MARIJUANA: THE SECOND TRIP* (1971) (discussing the history of marijuana usage); BOCK, *supra* note 8, at 131–78 (discussing the medicinal uses of marijuana); RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1974); NICK BROWNLEE, *THE ILLUSTRATED GUIDE TO CANNABIS* (2003) (noting the history, global and health impact of marijuana); ALBERT GOLDMAN, *GRASS ROOTS: MARIJUANA IN AMERICA TODAY* (1979) (telling the history of marijuana); LESTER GRINSPOON & JAMES B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* (1993) (exploring the different medicinal uses for marijuana in the treatment of diseases); *THE MARIJUANA PAPERS* (David Solomon ed., 1966) (noting the historical, sociological, cultural, literary, and scientific impact of marijuana); MARK D. MERLIN, *MAN AND MARIJUANA: SOME ASPECTS OF THEIR ANCIENT RELATIONSHIP* (1973) (focusing upon the origin of the marijuana plant in human history); ED ROSENTHAL & STEVE KUBBY, *WHY MARIJUANA SHOULD BE LEGAL* 35–60 (2003) (discussing marijuana's health effects, industrial, and medicinal applications); LARRY SLOMAN, *REEFER MADNESS: THE HISTORY OF MARIJUANA IN AMERICA* (1979) (detailing the role marijuana plays in American society); SOLOMON H. SNYDER, *USES OF MARIJUANA* (1971); MARTIN TORGOFF, *CAN'T FIND MY WAY HOME: AMERICA IN THE GREAT STONED AGE, 1945–2000* 258–93 (2004) (discussing the golden age of marijuana in America); Michael Aldrich, *History of Therapeutic Cannabis*, in *CANNABIS IN MEDICAL PRACTICE* 35–55 (Mary Lynn Mathre ed., 1997) (summarizing the history of the medicinal use of marijuana).

Clause challenges.<sup>26</sup> Invalidating the CSA as applied in *Raich*, however, would have cleared the way for States to enact liberal social policy free from interference by Washington. It may be that Justices Scalia and Kennedy, who had sided with the “conservatives” in earlier Commerce Clause cases, sided with the “liberals” in *Raich* to ensure that Congress retains power to frustrate liberal social policy.<sup>27</sup> Justice Stevens assures us that “[w]ell settled law controls our answer.”<sup>28</sup> At the end of the day, the Justices simply had to choose which of two basic, conflicting structural principles would prevail: *deference* to national power or the enforcement of *limits* on national power. By a vote of 6 to 3, they chose the former.

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<sup>26</sup> See, e.g., *Morrison*, 529 U.S. at 608–11 (striking down the Violence Against Women Act as unconstitutionally exceeding Congress’s Commerce Clause powers); *Lopez*, 514 U.S. at 559–84 (finding the federal Gun-Free School Zones Act unconstitutional because it exceeded Congress’s Commerce Clause authority); *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that insofar as the 1974 amendments operated directly to displace the States’ ability to structure employer-employee relationships in areas of traditional governmental functions, they were not within the authority granted Congress by the Commerce Clause).

<sup>27</sup> As one editorial page observed, “Federalism and the commerce clause bring out the hypocrite in all of us.” Editorial, *Unconstitutional Cannabis*, L.A. TIMES, June 7, 2005, at B12. Newbern thus speaks of “the ‘liberal paradox’—the odd position in which liberal advocates of state-legalized medical marijuana use are placed in arguing for a reduced role for the federal government against a history that equates such arguments with a time in which states clung to their autonomy as a means of preserving a racist past.” Newbern, *supra* note 8, at 1590. Beyond this, the Attorneys General of Alabama, Louisiana, and Mississippi submitted an *amicus curiae* brief supporting respondents Raich and Monson. See Brief for the States of Alabama et al. as Amici Curiae Supporting Respondents, *Ashcroft v. Raich*, 352 F.3d 1222 (9th Cir. 2003) (No. 03–1454). The irony of traditionally “conservative” state governments supporting respondents seeking to ensure access to medicinal marijuana was remarked upon in the press. See, e.g., Margot Roosevelt, *Red States Weigh in as the Court Goes to Pot*, TIME, Nov. 22, 2004, at 20 (highlighting the peculiar political alliances forged in *Raich*).

As for the conservatives, one commentator argues that Justices Scalia’s and Thomas’s parting of the ways in *Raich* can be explained by the former’s emphasis on judicial minimalism and the latter’s emphasis on originalism. See Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 793 (2005) (“Justice Thomas and Justice Scalia both favor originalism and judicial minimalism, but Justice Thomas stresses the former over the latter, and Justice Scalia the latter over the former.”). As for Justice Kennedy’s apparent change of direction from *Lopez* and *Morrison*, see Adler, *supra* note 24, at 768–70, for a discussion of various explanations that have been proposed to explain Justice Kennedy’s surprising conversion from a “once-reliable vote for a judicially enforced federalism . . . into a defender of federal power.” While it has been suggested that Justices Scalia and Kennedy voted as they did based on their substantive opposition to liberal drug laws, one commentator dismisses this as idle speculation. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 908 (2005) (“[I]t is idle to speculate that Justices Kennedy and Scalia betrayed their conservative colleagues for personal or political reasons . . .”).

*Raich* thus reminds us that broad versus narrow interpretations of structural constitutional phenomena, such as the permissible scope of national power, cannot be neatly classified as “liberal” or “conservative.” The issue in a case like *Raich* is fundamentally about where governmental power should rest, yet that yields one’s preferred policy outcome only if the level of government one thinks ought to be empowered to make law adopts one’s substantive policy preferences.

<sup>28</sup> *Gonzales v. Raich*, 545 U.S. 1, 6 (2005).

In Part II, I will sketch *Raich*'s factual and constitutional landscape in order to extract and articulate these two principles, and in turn the two major rules, that have emerged from the Court's Commerce Clause jurisprudence. In Part III, I argue that while Justice Stevens's reasons for ruling for Congress in light of the first rule are understandable, because he fails to respond to the force of the second rule and its underlying principle, his decision is ultimately indefensible and should be overturned at the first opportunity.<sup>29</sup> More immediately, however, since the Court might not revisit *Raich* soon, I assert that it is fitting and just that patients, doctors, caregivers, and law enforcement officials in states with medicinal cannabis laws have served notice that *Raich* will have no impact on their activities. They plan, in effect, to engage in borderline civil disobedience by defying the federal prohibition. Congress thus emerges as an irrelevant tyrant in this area of public policy, although it certainly could not have done so without the DEA's and the Court's help. I conclude that if States, along with other western liberal democracies, continue their recent trend toward the more rational, less destructive drug policy of harm reduction, Congress will eventually have to follow, contrary though such a scenario is to the theory of *Gonzales v. Raich*.

## II. RAICH'S FACTUAL AND CONSTITUTIONAL LANDSCAPE

Let us cover the ground more thoroughly. In his opinion for the Ninth Circuit, Judge Pregerson succinctly presented the facts as follows:

Appellants Angel McClary Raich and Diane Monson (the "patient-appellants") are California citizens who currently use marijuana as a medical treatment. Appellant Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms. Her doctor states that these symptoms are caused by a degenerative disease of the spine.

Raich has been using marijuana as a medication for over five years, every two waking hours of every day. Her doctor contends that Raich has tried essentially all other legal alternatives and all are either ineffective or result in intolerable side effects; her doctor has provided a list of thirty-five medications that fall into the latter category alone. Raich's doctor states that foregoing marijuana treatment may be fatal. Monson has been using marijuana as a medication since 1999. Monson's doctor also contends that alternative medications have been tried and are either in-

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<sup>29</sup> On how a future Court might do this, see generally Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 743-50 (2005). Professor Barnett represented the respondents in *Raich*.

effective or produce intolerable side effects. As the district court put it: "Traditional medicine has utterly failed these women . . . ."

Appellant Monson cultivates her own marijuana. Raich is unable to cultivate her own. Instead, her two caregivers, appellants John Doe Number One and John Doe Number Two, grow it for her. These caregivers provide Raich with her marijuana free of charge. They have sued anonymously in order to protect Raich's supply of medical marijuana. In growing marijuana for Raich, they allegedly use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California. Although these caregivers cultivate marijuana for Raich, she processes some of the marijuana into cannabis oils, balm, and foods.

On August 15, 2002, deputies from the Butte County Sheriff's Department and agents from the Drug Enforcement Agency ("DEA") came to Monson's home. The sheriff's deputies concluded that Monson's use of marijuana was legal under the Compassionate Use Act. However, after a three-hour standoff involving the Butte County District Attorney and the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's six cannabis plants.<sup>30</sup>

. . . .

Fearing raids in the future and the prospect of being deprived of medicinal marijuana, the appellants sued the United States Attorney General John Ashcroft and the Administrator of the DEA Asa Hutchinson on October 9, 2002. Their suit seeks declaratory relief and preliminary and permanent injunctive relief. They seek a declaration that the CSA is unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use. The appellants also seek a declaration that the doctrine of medical necessity precludes enforcement of the CSA to prevent Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use.<sup>31</sup>

On March 5, 2003, the district court denied the appellants' motion for a preliminary injunction. The district court found that, "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the appellants had not established the required "'irreducible minimum' of a likelihood of success on the merits under the law of this Circuit . . . ."<sup>32</sup>

### A. *The Commerce Clause Merits*

As this background indicates, though *Raich* centers on the *substantive* domain of the Commerce Clause, the case came to the District

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<sup>30</sup> Attorney General Ashcroft had "vowed to 'escalate the war on drugs.'" ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 67 (2004).

<sup>31</sup> Since the Ninth Circuit ruled for appellants on the Commerce Clause issue, it did not address their other arguments, including the medical necessity claim. See *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003), *rev'd sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>32</sup> *Id.* at 1225–26.

Court and Ninth Circuit in the *remedial* context of a request for a preliminary injunction. The questions are fused, however, since the substantive question must be addressed in order to resolve the remedial issue. As Judge Pregerson explains, "The traditional test for granting preliminary injunctive relief requires the applicant to demonstrate: (1) a likelihood of success on the *merits*; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting the injunction."<sup>33</sup> The Ninth Circuit gives the merits prong of this test, which embodies the Commerce Clause analysis, the lengthiest treatment. In this analysis, three cases are central: *Wickard v. Filburn*,<sup>34</sup> *United States v. Lopez*,<sup>35</sup> and *United States v. Morrison*.<sup>36</sup>

### B. *Wickard, Lopez, and Morrison*

*Wickard* involved amendments to the 1938 Agricultural Adjustment Act (AAA). To stimulate trade during the Depression, Congress sought to stabilize the *price* of wheat in the national market. This in turn required regulating the *volume* of wheat in interstate commerce, so the AAA provided national acreage allotments for wheat with quotas for individual farmers. Mr. Filburn owned a small Ohio farm. Although he was allotted 11.1 acres for his 1941 wheat crop, he grew 23 acres, intending to keep the excess crop for his own consumption. He was thus fined under the AAA, but he refused to pay and filed suit challenging the law's application to him under the Commerce Clause. Writing for a unanimous Court, Justice Robert Jackson upheld the law as applied to Mr. Filburn. Rejecting the formalist distinctions of earlier cases, Jackson wrote:

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in . . . . It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.<sup>37</sup>

In *Wickard*, thus, Justice Jackson provides an early enunciation of the rule that Congress can regulate any activity that has a substantial effect on interstate commerce. The question immediately arises how a single wheat farmer could possibly have such an effect, and the answer is found in *Wickard's* establishment of the *aggregation principle*. "That appellee's own contribution to the demand for wheat may be

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<sup>33</sup> *Id.* at 1227 (emphasis added). While Judge Pregerson mentions an alternative test, he notes the two "are not inconsistent," and indeed, "likelihood of success on the merits" is a key factor in both. *Id.*

<sup>34</sup> 317 U.S. 111 (1942).

<sup>35</sup> 514 U.S. 549 (1995).

<sup>36</sup> 529 U.S. 598 (2000).

<sup>37</sup> *Wickard*, 317 U.S. at 128.



trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."<sup>38</sup> Moreover, even "if we assume that [the wheat] is never marketed, it supplies the needs of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."<sup>39</sup> Establishing "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"<sup>40</sup> thus, Justice Jackson held that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."<sup>41</sup>

Issued more than fifty years after *Wickard*, *Lopez* was a landmark ruling.<sup>42</sup> At issue was § 922(q) of the Gun-Free School Zones Act of 1990 (GFSZA), which made it a federal crime for anyone knowingly to possess a firearm in a place he knew or should have known was within 1000 feet of a public or private school.<sup>43</sup> Mr. Lopez was arrested and charged under the state counterpart of the GFSZA, but those charges were dropped when federal agents charged him with

<sup>38</sup> *Id.* at 127–28. As Newbern notes, "*Wickard* stands for the proposition that no matter how personalized or local an economic actor's conduct might be, if her conduct, multiplied, would affect interstate commerce, it may fall under Congress's regulatory control." Newbern, *supra* note 8, at 1601.

<sup>39</sup> *Wickard*, 317 U.S. at 128.

<sup>40</sup> *Lopez*, 514 U.S. at 560.

<sup>41</sup> *Wickard*, 317 U.S. at 125. Pushaw argues that in *Wickard*, "judicial review under [the aggregation principle] became an empty formality." Pushaw, *supra* note 27, at 890.

<sup>42</sup> See generally Adler, *supra* note 24, at 754–59; Charles W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 835–41 (2005) (discussing the significance of *Lopez*). *Lopez* has been described as the opening shot in a Commerce Clause revolution. Denning & Reynolds, *supra* note 17, at 1257–62; Newbern, *supra* note 8, at 1632; Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC, Dec. 27, 2004, at 32. Newbern notes that "[w]ithin eight months of *Lopez*'s decision, more than eighty challenges to federal Commerce-Clause-based criminal statutes were filed in district courts. Four years after *Lopez* was handed down, that number had grown to 566 cases filed in federal courts." Newbern, *supra* note 8, at 1607 (footnote omitted). As Green thus observes, "the *Lopez* decision is central to the 'new federalism revival.'" Marcus Green, Comment, *Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 FORDHAM L. REV. 2543, 2545 (2004). This "new federalism revival" consists of three interrelated lines of cases involving the Tenth Amendment, Eleventh Amendment, and the Commerce Clause. *Id.* at 2546 n.27. In Calabresi's view, "[p]erhaps the most striking feature of the Rehnquist Court's jurisprudence has been the revival over the last 5–10 years of doctrines of constitutional federalism." Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001).

Greenhouse has opined that "the Rehnquist Court's federalism revolution . . . appeared this term to stall in its tracks," Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 3, 2004, at A1, but she relies primarily on an Eleventh Amendment case, *Tennessee v. Lane*, 541 U.S. 509 (2004), for this assertion. On the Eleventh Amendment, see Newbern, *supra* note 8, at 1614–17.

<sup>43</sup> 18 U.S.C. § 922(q) (2006).

violation of federal law.<sup>44</sup> Upon conviction, Lopez appealed, challenging § 922(q) as beyond Congress's commerce power on its face. Writing for a 5-4 majority, Chief Justice Rehnquist upheld the Fifth Circuit's reversal of Lopez's conviction.<sup>45</sup> Though the Court did not directly overrule *Wickard*, "it carefully limited the reach of *Wickard* . . . ."<sup>46</sup>

Issued five years after *Lopez*, *Morrison* was, in Professor Adler's view, "the real breakthrough for enumerated powers jurisprudence."<sup>47</sup> *Morrison* involved a provision of the federal Violence Against Women Act (VAWA) that provided a civil remedy for gender-motivated violence.<sup>48</sup> Christy Brzonkala, a student at Virginia Tech, claimed that another student had raped her and made statements showing a gender motivation for the attack. She sued him under the VAWA provision, but the District Court dismissed, partly on grounds that the civil remedy was beyond Congress's commerce power. The Fourth Circuit affirmed, as did the Supreme Court. Speaking for the same 5-4 majority as in *Lopez*, the Chief Justice wrote, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."<sup>49</sup> "[T]he Court indicated it was serious about enforcing the 'noninfinity principle,'"<sup>50</sup> by regarding skeptically any interpretation that would in effect convert the commerce power into a general police power.<sup>51</sup>

In *Lopez* and *Morrison*, the Court identified three broad categories of activity that Congress may regulate under its commerce power—the use of the *channels* of interstate commerce, the use of the *instrumentalities* of interstate commerce, and those activities that, in the aggregate, *substantially affect* interstate commerce.<sup>52</sup> In both cases, only the third category applied. As the Chief Justice wrote in *Lopez*, for example:

The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a

<sup>44</sup> *Lopez*, 514 U.S. at 551.

<sup>45</sup> *Id.* at 568.

<sup>46</sup> United States v. McCoy, 323 F.3d 1114, 1120 (9th Cir. 2003).

<sup>47</sup> Adler, *supra* note 24, at 759. For general notes on *Morrison*, see *id.* at 759–62.

<sup>48</sup> 42 U.S.C. § 13,981 (2006).

<sup>49</sup> United States v. Morrison, 529 U.S. 598, 610, 613 (2000). As the Court wrote, "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.

<sup>50</sup> Denning & Reynolds, *supra* note 17, at 1260.

<sup>51</sup> Though *Morrison* figures prominently in our analysis, it is distinct from *Lopez* and *Raich* in that 42 U.S.C. § 13,981 sought to regulate not possession, but rather, physical violence.

<sup>52</sup> United States v. Lopez, 514 U.S. 549, 558–59 (1995); *Morrison*, 529 U.S. at 608–09.

regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.<sup>53</sup>

Elaborating the meaning of this third category, then, and building on *Wickard*, Rehnquist reaffirmed what I shall call the first *Lopez* rule—the rational basis/substantial effects rule. As he wrote, “the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”<sup>54</sup> If the Court finds that Congress had a rational basis to enact a law challenged on Commerce Clause grounds, the first *Lopez* rule directs it to defer to Congress and uphold the law.

The first *Lopez* rule is thus rooted in the enduring principle of deference to national power in a federal system. Indeed, this was among the key considerations in drafting the Constitution; the Articles of Confederation had placed inadequate power in the central government.<sup>55</sup> As Madison thus argued, where national uniformity and efficiency are essential, presumptive deference to national power is warranted.<sup>56</sup> In both *McCulloch*<sup>57</sup> and *Gibbons*,<sup>58</sup> further, Marshall relied on this principle in ruling for Congress.<sup>59</sup>

<sup>53</sup> *Lopez*, 514 U.S. at 559. As Rehnquist wrote in *Morrison*,

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

*Morrison*, 529 U.S. at 609.

<sup>54</sup> *Lopez*, 514 U.S. at 557.

<sup>55</sup> See, e.g., AMERICAN POLITICAL THOUGHT 68–70 (Kenneth Dolbeare & Michael Cummings eds., 4th ed. 1998) (describing the Articles of Confederation); THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 1, at 309 (arguing for a stronger representative republic than that afforded by the Articles); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 24–28 (Max Farrand ed., 1966) [hereinafter FEDERAL CONVENTION] (recognizing the key weaknesses of the Articles of Confederation).

<sup>56</sup> THE FEDERALIST NO. 44 (James Madison), *supra* note 1, at 280–81. Moreover, “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.” *Lopez*, 514 U.S. at 574 (Kennedy & O'Connor, JJ., concurring).

<sup>57</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>58</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>59</sup> In *McCulloch*, 17 U.S. (4 Wheat.) at 316, Marshall famously deferred to Congress's power to charter a second Bank of the United States. In *Gibbons*, 22 U.S. (9 Wheat.) at 3, he gave the Commerce Clause itself its first great elucidation, upholding the validity of a federally granted license to navigate the waters between New York and New Jersey. While the principle underlying the rational basis/substantial effects rule is a legitimate one, Professor Pushaw criticizes the Court for reaffirming the rule without providing clear guidance for its application. As he writes, the Court

neglected to provide any concrete guidelines for determining what counts as “substantial” or how this effect should be calculated. . . .

. . . .

While *Lopez* thus reaffirmed the rational basis/substantial effects rule, it also asserted a countervailing rule. As Rehnquist wrote,

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.<sup>60</sup>

I shall call this rule—that mere possession, standing alone, is not economic activity regulable under Congress’s commerce power—the second *Lopez* rule.<sup>61</sup> While the first *Lopez* rule is rooted in the principle of *deference* to national power, the second *Lopez* rule is based on the equally fundamental principle of *limits* on that power.<sup>62</sup> As Chief Justice Rehnquist quoted Chief Justice Marshall in *Gibbons*,

. . . [Further,] the “substantial effects” test depends on two utterly subjective judgments. The first concerns the level of generality at which the regulated activity is characterized. . . . A second ambiguity is whether the “substantial effect” must be demonstrated affirmatively . . . or can be hypothesized through a “rational basis” test . . . .

Pushaw, *supra* note 27, at 895, 904–05.

<sup>60</sup> *Lopez*, 514 U.S. at 567. Reinforcing this point, Justice Kennedy in his *Lopez* concurrence refers to “our duty to recognize meaningful limits on the commerce power of Congress.” *Id.* at 580 (Kennedy & O’Connor, JJ., concurring). While commerce and economic activity are not identical, O’Connor notes that “[i]n *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity.” *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O’Connor, J., dissenting).

<sup>61</sup> As O’Connor writes, “*Lopez* makes clear that possession is not itself commercial activity.” *Raich*, 545 U.S. at 50 (O’Connor, J., dissenting).

<sup>62</sup> Together, these principles of deference to, and limits on, national power embodied in the *Lopez* rules reflect the two basic tasks of liberal constitutionalism—to empower government and to disempower government. In Madison’s words, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 322. These two principles are also Marshall’s legacy in Commerce Clause jurisprudence. *See, e.g.*, *Stafford v. Wallace*, 258 U.S. 495, 528 (1922) (holding that the enactment of the Packers and Stockyards Act was clearly within congressional power under the Commerce Clause); *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 359–60 (1914) (holding that Congress has the power under the Commerce Clause to regulate railroads); *Champion v. Ames*, 188 U.S. 321, 363 (1903) (upholding Congress’s plenary power to enact the Federal Anti-Lottery Act under the Commerce Clause). There, for example, the Court followed Marshall’s federalist lead, upholding exercises of federal power under the Commerce Clause, even where Congress appeared to be pursuing social rather than economic goals. On the other hand, in *Carter v. Carter Coal Co.*, 298 U.S. 238, 309–10 (1936) (holding that the Bituminous Coal Conservation Act of 1935 was beyond the power of Congress because the regulation of labor on a local level was beyond the purview of the Commerce Clause), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549–51 (1935) (holding the Live Poultry Code invalid because it was an unconstitutional delegation of legislative power and attempted to regulate intrastate transactions that affected interstate commerce only indirectly), and *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (holding that Congress did not have the power to regulate interstate commerce in the products of child labor), the Court drew sharp lines striking down federal laws allegedly grounded in the commerce power, even where Congress pursued economic as well as social goals.

Rehnquist noted that the second *Lopez* rule “may in some cases result in legal uncertainty.” *Lopez*, 514 U.S. at 566. As he went on to observe, however, “[t]he Constitution mandates this

It is not intended to say that these words [the Commerce Clause] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . *The enumeration presupposes something not enumerated* and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.<sup>63</sup>

uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.*

<sup>63</sup> *Lopez*, 514 U.S. at 553 (emphasis added) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 74). While Justices Stevens and Scalia cite *McCulloch* at length, they never responded to *Lopez's* citation of *Gibbons*. Moreover, while Justice Souter cites *Gibbons* for the proposition that we must simply trust Congress's wisdom, discretion, and identity with the people, he also never responds to *Lopez's* citation of *Gibbons*. *United States v. Morrison*, 529 U.S. 598, 648–49 (2000) (Souter, J., dissenting).

As Madison wrote, "[the national government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST NO. 39 (James Madison), *supra* note 1, at 245. As he further observed, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 309. Moreover,

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 323. As Hamilton added,

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions of the Constitution.

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 467.

Justice Breyer has recently advanced a democratic participatory ideal as a basic feature of his approach to constitutional interpretation. See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5–6 (2005) (describing his approach to interpreting the Constitution). He thus asserts that *Lopez* and *Morrison* were wrongly decided because, by enactment of the GFSZA and VAWA, "the public has participated in the legislative process at the national level." *Id.* at 62.

I see three problems with this formulation, particularly in regard to *Raich*. First, to the extent that the public participates in the national legislative process, this must be equally true of all federal laws. Under Breyer's criterion, then, any act of Congress is constitutional. Yet this renders Article I, Section 8 irrelevant as a source of limits on Congress's power, in turn rendering a written Constitution a pointless sham, an implication I have yet to see addressed by *Raich* supporters.

Second, Breyer's criterion references only acts of Congress, yet state law contrary to federal law is a basic feature of *Raich*. Unlike *Lopez* and *Morrison*, that is, *Raich* involves a direct conflict between federal and state law, of which Breyer's formulation takes no account. Moreover, the CUA was mandated by Proposition 215, a citizens' ballot initiative. Since Breyer expressly champions a democratic participatory ideal in constitutional interpretation, thus, he seems unprincipled in ruling against California voters in *Raich*.

Finally, Justice O'Connor argues that the limits on the commerce power implied by its enumeration are reinforced by the state sovereignty principle of the Tenth Amendment.<sup>64</sup>

### III. *RAICH* AND THE TWO *LOPEZ* RULES

#### A. *The First Lopez Rule: Rational Basis/Substantial Effects*

In *Raich*, as noted, the majority holds that the first *Lopez* rule is satisfied: the Court could find that Congress had a rational basis to conclude that interstate commerce would be substantially affected if it failed to criminalize even the private, personal cultivation and use of cannabis.<sup>65</sup> This is true even if the use is medicinal and recommended by a licensed physician under an otherwise valid law. Since *Wickard* upheld the challenged federal action and *Lopez* and *Morrison* did not, Stevens must argue that *Wickard* is indistinguishable from *Raich* and that *Lopez* and *Morrison* are distinguishable from *Raich*. As for *Lopez* and *Morrison*, Justice Stevens distinguishes these cases from *Raich* as involving facial rather than "as applied" challenges.<sup>66</sup> As for *Wickard*, on the other hand, Stevens writes that

[t]he similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, inter-

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Third, Breyer's failure to account for the structural claims of federalism in *Raich* is also illuminated by THE FEDERALIST NO. 39. There, Madison recognized the need to respond to the Anti-Federalist objection that while the proposed Constitution was adequately republican, it was not adequately federal. He thus went to great lengths to show that the Constitution had as much a federal as republican nature. THE FEDERALIST NO. 39 (James Madison), *supra* note 1, at 242–46. If the Federalists were this concerned, members of the *Raich* majority, like Breyer, who ignore the structural claims of federalism in *Raich*, seem to take a lopsided view, notwithstanding claims to consider several "basic elements—language, history, tradition, precedent, purpose and consequence." BREYER, *supra* note 63, at 8.

<sup>64</sup> See *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting) (arguing that the Tenth Amendment reinforces limits on the commerce power). Under our system, that is, States alone have a police power. According to Black's, the police power is "[a]n authority conferred by the American constitutional system in the Tenth Amendment . . . upon the individual states, and, in turn, delegated to local governments, through which they are enabled to . . . adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens . . ." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). As Kreit observes, health policy is traditionally left to the States under the police power. Kreit, *supra* note 8, at 1820–21. Since Congress's regulation of the activity in *Raich* is an exercise of the police power, Justice Thomas argues that it is not proper under the Necessary and Proper Clause. *Raich*, 545 U.S. at 59–60 (Thomas, J., dissenting).

In passing, Professor Pushaw treats the Court's emphasis on preventing Congress's interference with areas of traditional state concern as a third distinct ruling in *Lopez* and *Morrison*. See Pushaw, *supra* note 27, at 895 (discussing the Court's focus on protecting areas of traditional state concern). However, since this consideration functions, like the second *Lopez* rule, as a limit on Congress's power, I shall subsume it for our purposes under the second *Lopez* principle.

<sup>65</sup> See *Raich*, 545 U.S. at 15–22 (applying the first *Lopez* rule).

<sup>66</sup> See *id.* at 15 (noting the difference in the nature of the challenges among the cases).

state market. Just as the Agricultural Adjustment Act was designed “to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . .” and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.<sup>67</sup>

Referencing *Wickard*, *The New Republic* opines that *Raich* is “an uncontroversial application of Supreme Court decisions that have been settled since the New Deal.”<sup>68</sup> Yet this simply posits two dubious premises. First, it assumes that reliance on precedent is the sole le-

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<sup>67</sup> *Id.* at 18–19 (second alteration in original) (footnote and citation omitted). Justices O'Connor and Thomas both critique this argument. The majority, they argue, never shows that the activity at issue in *Raich*, even in the aggregate, substantially affects interstate commerce. As Justice O'Connor writes, the Court reaches its conclusion

without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce . . . . There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.

*Id.* at 43, 53 (O'Connor, J., dissenting); see also *id.* at 60–63 (Thomas, J., dissenting) (criticizing Stevens's argument).

Justice Stevens replies with a series of descriptive assertions about the CSA, for example, that it “was a lengthy and detailed statute creating a comprehensive framework,” that “[t]he regulatory scheme is designed to foster the beneficial use of those medications,” and that it “designates marijuana as contraband for any purpose.” *Id.* at 24, 27 (majority opinion). Such assertions, however, simply beg the question whether all this well-intended legislative activity exceeds Congress's constitutional powers. Thus, responds Justice O'Connor,

something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. . . . Indeed, if it were enough in “substantial effects” cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are “never more than an instant from the interstate market” in guns already subject to extensive federal regulation . . . and thereby upheld the Gun-Free School Zones Act of 1990.

*Id.* at 52 (O'Connor, J., dissenting).

Justice Stevens replies that the proof the dissents demand is not required, that the principle of presumptive deference on which the first *Lopez* rule rests requires only that the Court find that Congress *could rationally conclude* that its failure to criminalize the activity in question would, in the aggregate, have a substantial effect on interstate commerce. Conceding that Congress made no specific findings that the activities in *Raich* substantially affected the interstate cannabis market, thus, Stevens simply says that Congress need not do so. *Id.* at 20 (majority opinion) (explaining that the Court has never required Congress to make particularized findings in order to legislate, absent a special concern—such as for the protection of free speech). He never explains, however, why privacy, medical necessity, and the preservation of life do not fall within this class of “special concerns.” In any case, writes Justice O'Connor, “the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision.” *Id.* at 43 (O'Connor, J., dissenting). The majority ruling, she concludes, is “nothing more than a drafting guide” for Congress to ensure that it can pass any law it wishes so long as it relies on the commerce power. *Id.* at 46.

<sup>68</sup> *Joint Venture*, *NEW REPUBLIC*, June 20, 2005, at 7. See also *Morrison*, 529 U.S. at 637, 644 (Souter, J., dissenting) (noting that the Court had abandoned formalistic commercial distinctions in Commerce Clause cases in the aftermath of the New Deal, as encapsulated in *Wickard*).

gitimate mode of constitutional interpretation, but ignores other basic tools like text, logic, history, and structure. As Professor Pushaw writes, *Lopez and Morrison*

built upon the logically unassailable premise that, in our constitutional system of limited and enumerated powers, the Commerce Clause cannot be interpreted in a way that effectively leaves Congress with absolute discretion. Furthermore, the Court usefully redirected its attention to the pertinent constitutional language, which speaks of “commerce” that occurs “among the several States.”

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... [T]he Constitution grants the federal government enumerated powers because the Framers feared totally centralized authority, and the Supreme Court accordingly has an obligation to enforce the limitations set forth in Article I.<sup>69</sup>

Second, even putting this problem aside and assuming that precedent is the only legitimate source of constitutional interpretation, The New Republic also implicitly assumes that the only relevant precedents are New Deal rulings like *Wickard*, rather than older ones like *Gibbons* or newer ones like *Lopez and Morrison*. Indeed, Justice Stevens writes that “none of our Commerce Clause cases can be viewed in isolation,”<sup>70</sup> yet that is exactly what he does by focusing exclusively on *Wickard*. When the limits on Congress’s commerce power, reinforced by *Gibbons*, *Lopez and Morrison*, are factored into the equation, *Raich* emerges as highly controversial, *The New Republic*’s dismissal notwithstanding.<sup>71</sup>

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<sup>69</sup> Pushaw, *supra* note 27, at 894, 912 (footnote omitted). See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget that it is a *constitution* we are expounding.”); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 108, 120 (2000) (analyzing the concept of enumerated powers with respect to women’s rights and religion). We are interpreting a charter of government, a basic structural feature of which is the division of power that is federalism. If the word “Commerce” in Article I, Section 8 can be construed to have unlimited meaning, then it appears that “written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Even assuming that the private adult possession and medicinal use of cannabis is “Commerce” within the meaning of Article I, Section 8, Diane Monson’s activity should still have been *unreachable* under the Commerce Clause because, even if it is commerce, it is in no fair sense *interstate* commerce. The activity criminalized by federal law took place completely in her home. Particularly if a plant is in the ground rather than in a container, its possession is as non-interstate as an activity can be.

<sup>70</sup> *Raich*, 545 U.S. at 15.

<sup>71</sup> See Jeffrey Rosen, *The Unregulated Offense*, N.Y. TIMES, Apr. 17, 2005, § 6 (Magazine), at 44, for more background and a discussion of the “Constitution in Exile” debate. The term “Constitution in Exile” (CIE) is attributed to Douglas Ginsberg, a federal appellate judge. This is the same Judge Ginsberg, it must be noted, whose nomination to the U.S. Supreme Court by President Reagan immediately following the Robert Bork debacle was derailed when it came to light that he had smoked marijuana as a Harvard law professor. Linda Smokedhouse, *Hearings to Begin for Court Nominee*, N.Y. TIMES, Dec. 14, 1987, at A1.

By “Constitution in Exile,” writes Rosen, “Ginsberg meant to identify legal doctrines that established firm limitations on state and federal power before the New Deal.” Rosen, *supra*, at 44.



Beyond this, there is a flaw in the majority opinion that neither the dissents nor the *Lewis and Clark Law Review* Symposium addresses directly. Stevens acknowledges that in *Wickard*, the AAA sought to protect and stabilize an interstate market while in *Raich*, the CSA seeks to destroy an interstate market.<sup>72</sup> The laws by which Congress sought to reach the two activities thus have very different functions,<sup>73</sup> yet Stevens claims that this is of “no constitutional import.”<sup>74</sup> After all, we saw in his reference to *Wickard* that he lumps the two laws together by referring to Congress’s interest in *controlling* the supply and demand of wheat.<sup>75</sup> Yet such a position is untenable, for unless the rational basis/substantial effects test is to be without effect, whether Congress has a rational basis to criminalize an activity depends on the goal it seeks to attain. Some means are irrational given certain ends. If Congress’s goal is to *destroy* a market, then, there is simply no rational basis to undermine a state law that functions to *diminish* that market, since the state law advances Congress’s ends.<sup>76</sup>

Indeed, Justice Stevens seemed to recognize this at oral argument. As he said to the Solicitor General in reference to Monson’s cannabis

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Among those associated with the concept of CIE is Justice Thomas, who wrote in *Lopez* that, “[i]f anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.” *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). Reinforcing this view in *Raich*, Thomas asserts that the substantial effects prong of the *Lopez* test is so rootless and malleable as to be illegitimate. *See Raich*, 545 U.S. at 67 (Thomas, J., dissenting) (criticizing the substantial effects requirement); *see also* William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It In from the Cold?*, 51 DUKE L.J. 1, 25–26 (2001) (discussing how the origin of the CIE concept came from Chief Justice Marshall).

<sup>72</sup> *Raich*, 545 U.S. at 19 n.29 (noting that the CSA is seeking to eradicate the interstate marijuana market).

<sup>73</sup> In Rehnquist’s words,

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not. . . . [T]he Agricultural Adjustment Act of 1938 . . . was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages. . . .

*Lopez*, 514 U.S. at 560. Kreit observes that “the CSA does not seek to control the price of marijuana but rather to prevent its interstate distribution entirely.” Kreit, *supra* note 8, at 1824. Gouldin adds that the “analogy between growing marijuana for personal use and the cultivation of wheat for household use . . . ignores the critical differences between effects on a legitimate market and on a black market.” *See* Gouldin, *supra* note 8, at 514. *Morrison*, we saw, reaffirmed the distinction between economic and criminal activity. *See* Newbern, *supra* note 8, at 1620.

<sup>74</sup> *Raich*, 545 U.S. at 19 n.29.

<sup>75</sup> *Id.* at 15 (discussing that the purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets). Similarly, Justice Souter’s claim that the Court must defer where Congress has a rational basis to think that a law *protects* commerce, *see* *United States v. Morrison*, 529 U.S. 598, 641 (2000) (Souter, J., dissenting), is irrelevant where, as with the CSA, Congress clearly seeks not to protect but to destroy a market.

<sup>76</sup> Likewise, Justice Scalia writes that “the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market.” *Raich*, 545 U.S. at 37, n.2 (Scalia, J., concurring in judgment). This illustrates my point: Where Congress simply seeks to protect and stabilize an interstate market, it has a rational basis in countering diminished demand in that market. Where it seeks to destroy such a market, it does not.

plants, “this marijuana won’t get into interstate commerce. In fact it would *reduce the demand* for marijuana, because it would supply these local users and they wouldn’t have to go into the interstate market.”<sup>77</sup> In his opinion, however, Justice Stevens suggests that the CUA does just the opposite. As he writes,

Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress has a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.<sup>78</sup>

So, why the change of heart? How can Justice Stevens shift from the assumption that the CUA reduces demand to the assertion that it increases supply? Quite easily, it seems: he simply defers to Congress’s assumption, which thinks the best about those within the beltway and the worst about those outside the beltway. When it comes to cannabis policy, that is, Congress and the Federal Drug Administration alone are trustworthy, while doctors, patients, caregivers, and law enforcement officials in states with medicinal cannabis laws are corrupt.<sup>79</sup> Unlike the dissenters, who note that the Court usually assumes that states enforce their own laws,<sup>80</sup> Justice Stevens simply accepts that Congress could rationally conclude that states would not properly regulate marijuana under their own laws.<sup>81</sup> Justice O’Connor concedes that, while unsubstantiated, such an assumption

<sup>77</sup> Transcript of Oral Argument at 8, *Raich*, 545 U.S. 1 (No. 03-1454), 2004 WL 2845980 (emphasis added).

<sup>78</sup> *Raich*, 545 U.S. at 22 (footnote and citation omitted). As he adds elsewhere, “The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.” *Id.* at 31.

<sup>79</sup> See generally *id.* at 19, 30–31 (discussing California’s inability to police the illegal marijuana market and thus its inability to keep the effect of medicinal cultivation of marijuana within the State).

<sup>80</sup> See *id.* at 57 (O’Connor, J., dissenting) (noting that James Madison wrote that the Constitution reserves “to the several States” powers which, “in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State”); *id.* at 63 (Thomas, J., dissenting) (stating that there is no evidence that California’s control over the intrastate cultivation and use of marijuana is insufficient).

<sup>81</sup> Justice Stevens suggests that if Congress does not regulate such substances, as it has with the CSA, the States will legalize the private possession and use of cocaine, LSD, and heroin. *Id.* at 28. As Chief Justice Rehnquist has written elsewhere, however, “the extreme examples are seldom the ones that arise in the real world of constitutional litigation.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 907 (1982) (Rehnquist, C.J., dissenting). Relatedly, *The New Republic* refers to those who oppose *Raich* as “antiregulatory,” JOINT VENTURE, *supra* note 68, at 7, yet this is just a misleading label. Simply because one thinks a policy domain should be left to the states does not establish that he or she is “antiregulatory.” It may simply be that, under the federal system created by the Constitution, the person believes that regulation of police power concerns, like public health, should presumptively be left to the states.

is not implausible in all cases.<sup>82</sup> Justice Stevens, however, had shown respect at oral argument for “the independent judgment of the physicians who prescribe it for the patients at issue in this case.”<sup>83</sup> He thus seems inconsistent and arbitrary on this basic point.

Yet let us give Justice Stevens his due. After all, he at least recognizes that he must speak to this issue. If the constitutional law in this area really is that Congress need only be able to conclude rationally that its failure to criminalize a given activity will substantially “affect” or “impact” interstate commerce, that is, *regardless of whether that “impact” is an increase or a decrease in the volume of that commerce*, then Congress’s power is simply unlimited. Justice Stevens knows that this is untenable, however, for reasons we have seen. He thus recognizes that he must assert that Congress could rationally conclude that the CUA increases the supply of marijuana in interstate commerce. That would presumably be a rational basis for Congress to criminalize the activity in question. It is just unfortunate that the Court finds that it must defer to Congress’s assumption that only organs of the national government, like Congress and the Federal Drug Administration (FDA), are wise and trustworthy, while all those outside the beltway are misguided and inclined to crime. Even so staunch a Federalist as Justice Marshall, we saw, had a more balanced view than this.

Again, however, let us give Justice Stevens his due. For one thing, he can say that his suggestion at oral argument, that the CUA reduces demand in the interstate cannabis market, did not reflect his real views. He advanced it, that is, simply to test the lawyers arguing the case in order to derive better guidance from them. Moreover, even if he truly believed at oral argument that the CUA functions overall to reduce cannabis demand, and that the independent judgment of physicians (outside the FDA) could be trusted, he can always claim that added reflection on the matter led him to a different conclusion.

Even beyond this, Stevens’s broader view seems clear. As our national legislature, Congress is where an issue of national proportion like cannabis policy should be resolved in the first instance if possible.<sup>84</sup> The basic problem, after all, is a federal statute—the CSA—specifically its classification of marijuana under Schedule I. The dispute in *Raich* would dissolve if Congress simply rescheduled cannabis as a Schedule II substance, thus allowing states to legalize it for medicinal use, subject to a doctor’s recommendation. Alternatively, Ste-

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<sup>82</sup> See *Raich*, 545 U.S. at 55–57 (O’Connor, J., dissenting) (discussing the regulations the State of California has put into place to regulate the use and cultivation of medicinal marijuana in the State).

<sup>83</sup> Transcript of Oral Argument, *supra* note 77, at 19.

<sup>84</sup> In one scholar’s words, “If one wants a centralized decisionmaker to be in a position to make policy judgments, it will have to be Congress.” Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power when the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779, 788 (2005).

vens could note, Congress can vote to block enforcement of federal law where it conflicts with state medicinal cannabis laws.<sup>85</sup> Thus, he can say this should all be worked out by the political resources available, without judicial intervention.

One objection may be that Congress has long been intransigent on this issue, dominated by a religious mindset<sup>86</sup> that has been exacerbated by the “reefer madness” propaganda of the 1930’s.<sup>87</sup> Yet Stevens can reply that precisely due to the *Raich* litigation, the issue of medicinal cannabis reform now has unprecedented political and legal visibility and momentum. If Congress has been unresponsive until now, he can say, the Court’s ruling in *Raich* has created an opening, an opportunity for appropriate reform.<sup>88</sup> Ultimately, then, it is difficult to fault Stevens’s judgment that Congress is the forum to which medical cannabis reformers should apply, and that the Court had to rule for Congress by any means necessary. While I shall argue that “difficult” does not mean “impossible,” we must nonetheless give Justice Stevens his due.

### B. *The Second Lopez Rule: Possession Is Not Commerce*

I have labeled the rule that possession alone is not “Commerce” the second *Lopez* rule. While Justice Stevens never formally invali-

<sup>85</sup> While it may be objected that Congress has consistently declined to do this, Justice Stevens could observe that this proposal gains more votes in Congress every year. In 2003, for example, the States’ Rights to Medical Marijuana Act had the support of 152 members of the House. See *Congressional Votes for NYT-AK the Week of 7/18–7/25/2003*, STS. NEWS SERVICE, July 25, 2003 (noting that the House, by a vote of 152 to 273, rejected an amendment to an appropriations act that would have prohibited the government from trying to override state laws that allow the medicinal use of marijuana). In 2006, however, such a proposal had the support of 163 members. See *Last Week in Congress/How Our Representatives Voted*, BUFFALO NEWS, July 2, 2006, at A8 (stating that the House, by a vote of 163 to 259, rejected an amendment to the appropriations bill that would have prohibited the use of the funds to enforce federal laws on marijuana where states had passed a law allowing the use of marijuana for medical reasons). Further, now that *Raich* has directed reformers to the federal government, Professor Craker seems to have some leverage in his bid to conduct a study of the medicinal properties of cannabis. See *Hearings Begin Today in ACLU Challenge to Court Obstruction of Medical Marijuana Research* (Aug. 22, 2005), <http://www.aclu.org/drugpolicy/medmarijuana/20166prs20050822.html>; see also Marc Kaufman, *Federal Marijuana Monopoly Challenged: Researchers Want to Grow More Plants and Find More Medicinal Uses*, WASH. POST, Dec. 12, 2005, at A2 (noting that Professor Craker at the University of Massachusetts will argue before the Drug Enforcement Administration for a license to grow the research drugs).

<sup>86</sup> See SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* 158–64 (2005) (describing the influence of religion).

<sup>87</sup> See generally GERBER, *supra* note 8, chs. 1–3 (describing marijuana’s status during the 1930’s); SLOMAN, *supra* note 25, at 29–83 (noting the reefer madness propaganda of the 1930’s).

<sup>88</sup> Two scholars suggest that *Raich* may have a reforming impact—on the Endangered Species Act. See generally Michael C. Blumm & George A. Kimbrell, *Clear the Air: Gonzales v. Raich, the “Comprehensive Scheme” Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491 (2005).

dates this rule in *Raich*, Merrill observes that it “was watered down to the point where it may have little continuing significance.”<sup>89</sup> When a judge does this, however, he justifies later courts in doing the same to his rulings unless he can persuade those courts that he had a principled basis for avoiding controlling precedent. I submit that Stevens’s failure to carry this burden of persuasion is evident in three ways. First, he never overcomes the gravitational force of *Lopez* and *Morrison*. Second, his ruling rests on an indefensibly broad definition of “economic activity,” one he never even has to use, given the cases he cites and the concerns expressed by the prominent editorial pages that praised *Raich*. Third, he tries to derive “ought” from “is” by suggesting that since Congress criminalizes mere possession of other items, the Court is not bound to observe the second *Lopez* rule. I submit that his position is weak on all three grounds, and that his ruling should be overturned at the first opportunity. Let us take these grounds one at a time.

### 1. *The Gravitational Force of Lopez and Morrison*<sup>90</sup>

In *Lopez*, we saw how the GFSZA criminalized mere possession of a class of objects, much as the CSA does in *Raich*. The subject matter in *Raich*, however, is far less dangerous than that in *Lopez*. While no one has ever died from consuming cannabis,<sup>91</sup> that is, thousands are killed or wounded each year by guns. If the Commerce Clause bars federal power to criminalize public possession of firearms, then, it must also bar federal power to criminalize merely private possession of cannabis for personal medicinal use. The Court should thus have upheld the Ninth Circuit based on fidelity to *Lopez* alone.<sup>92</sup>

Unlike the GFSZA, which criminalized mere possession of a class of objects, the Violence Against Women Act (VAWA) criminalized gender-motivated violence. Like *Lopez*, however, *Morrison* recognized that the Commerce Clause limits Congress’s power to criminalize even what all agree to be a serious threat to human safety. Thus, if

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<sup>89</sup> Merrill, *supra* note 42, at 826; see also Adler, *supra* note 24, at 753 (arguing that *Raich* represents a repudiation of *Morrison* and *Lopez*).

<sup>90</sup> Dworkin speaks of precedent’s “gravitational force,” and “the fairness of treating like cases alike.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977). As Rawls adds, “the rule of law . . . implies the precept that similar cases be treated similarly.” JOHN RAWLS, *A THEORY OF JUSTICE* 237 (1971).

<sup>91</sup> See *THE DRUG LEGALIZATION DEBATE* 101–02 (James A. Inciardi ed. 1999) (containing an article by Professor Grinspoon of Harvard stating that “despite its use by millions of people over thousands of years cannabis has never caused a death”).

<sup>92</sup> Fairly applied, in fact, the second *Lopez* rule would have stopped application of the first *Lopez* rule in its tracks, for it establishes a threshold inquiry: is the *activity* being regulated, rather than its *effects*, economic (or more faithfully to the text, commerce)? If not, there is nothing to aggregate, for even a billion times zero is zero. The aggregation principle is thus inapplicable, and provides no support for a ruling for Congress.

the violent, *malum in se* activity criminalized by the VAWA is beyond Congress's regulatory power, then the peaceful, private, medicinal, merely *malum prohibitum* activity criminalized by the CSA must be as well. Even applying a rational basis test to federal action, as the majority claims to do, Justice Stevens never adequately responds to these basic features of the relevant case law terrain. A fair application of *Morrison*, especially in light of *Lopez*, should have led the *Raich* Court to uphold the Ninth Circuit's decision.

This conclusion is reinforced, moreover, by two further considerations. First, if Congress may not even compliment or duplicate the exercise of state police power where the subject matter or activity in question is beyond the commerce power, then it may certainly not undermine it, as the CSA does to the CUA. Second, in the recent Senate confirmation hearings for Justices Roberts and Alito, Judiciary Committee Democrats asserted that *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>93</sup> deepened and strengthened *Roe's* legitimacy,<sup>94</sup> while denying that *Morrison* had the same effect on *Lopez*.<sup>95</sup> This seems arbitrary,<sup>96</sup> and so again, fairly applied, *Lopez*, as reinforced by *Morrison*, should have compelled the Court to uphold the Ninth Circuit.

## 2. *An Illegitimate, Unnecessarily Broad Definition of "Commerce"*

Justice Stevens's next failure regarding the second *Lopez* rule is evident in his adoption of "a capacious definition of 'economics' found in a forty-year old dictionary."<sup>97</sup> As he writes, "'Economics' refers to 'the production, distribution, and consumption of commodities.'"<sup>98</sup> Since Monson was "producing" and consuming a "commodity" by this definition, she was engaged in "economic" activity that, in the aggregate, can be criminalized under Congress's commerce power. As Justice Breyer has written, after all, "virtually every kind of activity, no matter how local, genuinely can affect commerce, or its

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<sup>93</sup> 510 U.S. 1309 (1994).

<sup>94</sup> See *Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States*, 109th Cong. 145, 150–55 (2006) (statement of Sen. Feinstein, Member, Senate Comm. on the Judiciary) (asking then-Judge Alito if he thought there was any special justification that might override *Casey's* confirmation of the soundness of *Roe*).

<sup>95</sup> See Adler, *supra* note 24, at 761 (discussing the denial of *Morrison's* impact on *Lopez*).

<sup>96</sup> The assertion that *Raich* limited *Lopez* and *Morrison* to their facts, while perhaps accurate for the time being, will do little to convince Justices Roberts and Alito that it should remain so if they do not already agree. See Merrill, *supra* note 42, at 844 (describing the limitations imposed by *Raich*).

<sup>97</sup> Pushaw, *supra* note 27, at 898.

<sup>98</sup> *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

conditions, outside the State—at least when considered in the aggregate.”<sup>99</sup>

In an abstract, philosophical sense, it may be that all human activity is “economic.”<sup>100</sup> As Professor Pushaw notes, however, the Court in *Lopez* and *Morrison* “mistakenly used ‘commerce’ and ‘economics’ interchangeably, instead of recognizing that the former is a subset of the latter.”<sup>101</sup> Even putting this aside and assuming that the two terms can be used as synonyms, the dissents argue that Stevens’s definition is out of place in Commerce Clause interpretation.<sup>102</sup> There must be

<sup>99</sup> *United States v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting).

<sup>100</sup> As an analogy in free speech law, one could say that in a broad, philosophical sense all human expression is “political.” Since political speech is among the most highly protected forms of expression under the First Amendment, even obscenity, defamation, or fighting words would be presumptively protected as political speech, which cuts deeply against the thrust of First Amendment jurisprudence.

<sup>101</sup> Pushaw, *supra* note 27, 895 (citations omitted). He continues:

“Commerce” means selling property or services in the marketplace, as well as preparatory activities for that purpose. By contrast, “economics” is an umbrella term that covers anything—commercial or not—that relates to the production, distribution, or use of goods or services. For instance, rape and gun possession near schools have “economic” impacts, but they are not “commerce.”

*Id.* (citations omitted). See also *id.* at 913 (noting that, by its terms, the Commerce Clause does not empower Congress to regulate economic activity that is not also commercial activity).

<sup>102</sup> As Justice O’Connor writes,

The Court’s definition of economic activity is breathtaking. . . . [It] threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between “what is national and what is local.” It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect of the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power.

....

. . . [Even] *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress’s reach.

*Raich*, 545 U.S. at 49–51 (O’Connor, J., dissenting) (citations omitted).

As Thomas adds,

the majority defines economic activity in the broadest possible terms . . . . This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. . . . One searches the Court’s opinion in vain for any hint of what aspect of American life is reserved to the States.

*Id.*, at 69–70 (Thomas, J., dissenting) (citations omitted).

Speaking of potluck suppers, it seems that Congress could, under the Court’s definition, easily criminalize the consumption of certain foods, e.g., all manner of “fast food,” on grounds that it is not good for us. As with guns and alcohol, hundreds of thousands of people die every year from obesity-related ailments, while no one has ever died from consuming cannabis. That Congress will never do so because the fast food lobby is as powerful as the tobacco and alcohol lobbies is beside the point.

As Justice Kennedy, joined by Justice O’Connor, has observed, “In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we

a workable clear line between commerce and non-commerce, they argue, since otherwise the Commerce Clause has been rendered devoid of meaning. Stevens's hyperexpansive definition of "economics," for purposes of interpreting "Commerce" in Article I, Section 8, is thus simply illegitimate where that clause was clearly meant, and interpreted by Marshall, to limit as well as grant power.<sup>103</sup>

Had Stevens really wanted a definition of "economics" for purposes of a legitimate interpretation of the Commerce Clause, I submit that he would have consulted at least one more authority, like *Roget's Thesaurus*. Unlike *Webster's*, *Roget's* supplies a range of synonyms for a given word, thus providing a fuller, more accurate picture of the word's meaning than that obtained in a short, abstract definition. With respect to the word "economy," it provides the following:

"Verbs 849.7-8: economize, save, scrimp, skimp, scrape and save, keep within one's means or budget, retrench, cut down, cut down expenses, cut corners, cut back;

*Adjectives* 849.9: economical, thrifty, frugal, unwasteful, prudent, provident, saving, economizing, spare, sparing, scrimping, skimping."<sup>104</sup>

By these lights, "economic" activity could fairly be defined as that activity performed with a primary motive either to maximize one's chances of financial/material gain or to minimize one's chances of financial/material loss. This covers a range of activity, yet it also establishes a coherent limit on the meaning of the word "economic." Activities related to sex and guns provide several illustrations. While marital sex would not be economic activity under the *Roget's* definition, prostitution would be.<sup>105</sup> Similarly, while merely possessing a gun or pornography<sup>106</sup> would not be economic activity under the *Ro-*

have not yet said the commerce power may reach so far." *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

<sup>103</sup> See *supra* note 62 (discussing the two principles of Marshall's legacy in Commerce Clause jurisprudence, which is to limit as well as grant congressional power). Thus, "While recognizing that the most expansive uses of the commerce power should be confined to economic activities, the majority so expanded the definition of 'economic' so as to leave this a meaningless qualification." Adler, *supra* note 24, at 762. As Merrill adds, "With respect to the innovation limiting the substantial effects test to economic activity, the [*Raich*] majority did not deny that such a restriction had been imposed by *Lopez* and *Morrison*. But it largely drained the innovation of any significance, by defining 'economic' in sweepingly broad terms[.]" Merrill, *supra* note 42, at 844.

<sup>104</sup> ROGET'S INTERNATIONAL THESAURUS (3d ed. 1962) §§ 849.7-9.

<sup>105</sup> Stephen Barnett suggested this distinction at oral argument. TRANSCRIPT OF ORAL ARGUMENT, *supra* note 77, at 49. One can only hope that all agree that prostitution is economic activity in a way that marital sex (at least sometimes) is not.

<sup>106</sup> See *United States v. McCoy*, 323 F.3d 1114, 1133 (9th Cir. 2003) (holding that a federal statute prohibiting possession of child pornography made with materials that traveled in interstate commerce was unconstitutional as applied to private family photographs depicting a woman and her young daughter with exposed genitals).



get's definition,<sup>107</sup> buying, selling, or brandishing a gun in a robbery would be. Physical violence would not be economic activity under the *Roget's* definition unless done for purposes of robbery or extortion.<sup>108</sup>

In general, much solitary activity, especially in one's home, would be non-economic by the *Roget's*-derived definition. If I play my guitar, practice T'ai Chi Chuan, read a poem, take an aspirin, or consume cannabis in the privacy of my home, I do so simply to feel better, not for financial reasons. While states could regulate or prohibit some of these actions under their police power, none would be economic activities under the *Roget's*-based definition,<sup>109</sup> and thus regulable under Congress's commerce power. Had Stevens sought out and fairly applied the definition of "economics" derivable from a relevant authority like *Roget's*, he could never have ruled as he did. His ruling thus appears blatantly result-oriented and should be overruled.

### 3. Case Law/Editorial Authority: Civil Rights, Labor, and Environmental Protection

As we turn to the case law that Stevens cites, a tragic irony emerges: the *Roget's* definition shows that he did not even need the broad definition he adopted in order to secure Congress's regulatory power in the policy areas in which he and prominent editorial pages expressed concern; reliance on the *Roget's* definition would have sufficed. Justice Stevens cites the coal mining pollution case of *Hodel v.*

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<sup>107</sup> Though it may be argued that, even where mere possession is involved, "Congress can establish reasonable presumptions that the production or possession of a certain significant quantity of goods indicates an intent to sell them." Pushaw, *supra* note 27, at 909.

<sup>108</sup> Further, although Stevens tries to lump them all together, "manufacturing" and "production" denote far more than mere possession. *Gonzales v. Raich*, 545 U.S. 1, 22, 25–26 (2005).

<sup>109</sup> Justice O'Connor suggests that one of the "objective markers" available to separate the activity involved in this case from that properly regulable under the Commerce Clause is that the CUA only legalizes the *medicinal* use of cannabis (under a licensed physician's supervision) and not its *recreational* use. *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting) (discussing regulable activity under the Commerce Clause). While Justice O'Connor's opinion should have controlled in *Raich*, she is incorrect on this point, and even Professor Pushaw overlooks this distinction. See Pushaw, *supra* note 27, at 910 (conceding that private non-medical use of marijuana in the home is subject to government regulation). From a Commerce Clause perspective, that is, medicinal and recreational uses are identical insofar as the activity itself—consumption of cannabis—is the same regardless of the purpose for which it is consumed. Justice Stevens is thus correct that both medicinal and recreational use are on the same side of the boundary between what Congress can and cannot reach under its commerce power. See *Raich*, 545 U.S. at 25–29 (discussing activities Congress can reach). He is wrong, however, about which side of the line they are both on. Mere possession and consumption of small amounts of cannabis, whether for medicinal or recreational purposes, are not economic activities. They involve neither a transaction in which something of value changes hands nor an activity performed for financial profit or to avoid financial loss.

*Virginia Surface Mining & Reclamation Ass'n*,<sup>110</sup> for example, as well as the civil rights cases of *Katzenbach v. McClung*<sup>111</sup> and *Heart of Atlanta Motel v. United States*.<sup>112</sup> As for the editorial pages, *The Washington Post* wrote that “[a] Supreme Court decision disallowing federal authority in [the area of federal drug control] would have been a disaster in areas ranging from civil rights enforcement to environmental protection.”<sup>113</sup>

In response to Monson and Raich’s position, *The Washington Post* continued, “consider its implications. Can Congress protect an endangered species that exists only in a single state and may be wiped out by some noncommercial activity? Can it force an employer who operates only locally to accommodate the disabled?”<sup>114</sup> In its praise of *Raich*, similarly, *The New York Times* announced that “we take very seriously the Court’s concern about protecting the Commerce Clause, the vital constitutional principle that has allowed the federal government to thwart evils like child labor and segregation.”<sup>115</sup> Deriding the *Raich* dissents, *The New York Times* continued, “These conservatives want to turn the clock back to before the New Deal, when workers

<sup>110</sup> 452 U.S. 264, 305 (1981) (upholding the federal Surface Mining and Reclamation Act in the face of a Commerce Clause challenge).

<sup>111</sup> 379 U.S. 294, 305 (1964) (upholding the enforcement of the Civil Rights Act of 1964 against local restaurants on the grounds that a substantial portion of the food served moved in interstate commerce).

<sup>112</sup> 379 U.S. 241, 261–62 (1964) (holding that the interstate movement of persons constitutes commerce). In *McClung* and *Heart of Atlanta Motel*, the Court upheld Congress’s commerce power to enforce Title II of the 1964 Civil Rights Act, prohibiting racial discrimination in public accommodations. Justice Stevens also cites *Perez v. United States*, a case involving a statute that criminalized loansharking, i.e., “extortionate credit transactions,” which is clearly commercial activity. 402 U.S. 146, 155–56 (1971). He also cites *Champion v. Ames*, 188 U.S. 321, 363 (1903), yet this involved lottery tickets which, unlike cannabis, have no medicinal value. Indeed, they are not even consumed, like alcohol and cigarettes, and thus have only exchange value, i.e., they are necessarily only articles of commerce. Finally, it was undisputed in *Champion* that the tickets had moved interstate, so this case is not remotely analogous to the facts in *Raich*.

<sup>113</sup> Editorial, *Not About Pot*, WASH. POST, June 8, 2005, at A20. Similarly, Representative Charles Gonzales recently testified during the Senate Judiciary Committee hearings on the nomination of Justice Alito that future rulings by the Supreme Court that followed Alito’s dissent in *United States v. Rybar*, 103 F.3d 273, 286–94 (3d Cir. 1996) (Alito, J., dissenting), would prevent Congress from protecting “civil rights.” *Judiciary Committee Hearings on the Nomination of Samuel Alito for the Supreme Court* (C-SPAN television broadcast Jan. 16, 2006). I shall return to a discussion of Justice Alito’s ruling in *Rybar*, see *infra* note 149.

<sup>114</sup> *Not About Pot*, *supra* note 113, at A20. See also Pia Lopez, *Thomas’s Disturbing Views in Dissent to Pot Ruling*, SACRAMENTO BEE, June 10, 2005, at B7 (claiming that for Justice Thomas, laws regulating working conditions and hours and environmental laws should be gone). In response to President Bush’s nomination of John Roberts to the Supreme Court, the Alliance for Justice says Robert’s dissent in *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), could “undermine a wide swath of federal protections, including many environmental, civil rights, workplace, and criminal laws.” Ronald Brownstein, *Opponents of Nominee Taking Populist Tack: Critics of John Roberts Jr. for High Court Justice Are Talking Economics, Not Abortion Rights*, L.A. TIMES, July 23, 2005, at A13.

<sup>115</sup> Editorial, *The Court and Marijuana*, N.Y. TIMES, June 8, 2005, at A18.

were exploited, factories polluted at will and the elderly faced insecure retirements.”<sup>116</sup>

Justice Stevens's precedents and the editorials identify three key policy areas in which Congress's power to regulate would allegedly be jeopardized had the Court ruled for Monson and Raich: civil rights, labor, and environmental protection. Since a Roget's-based definition of economics would encompass all three spheres of activity, however, the Court's sweeping definition was unneeded to secure Congress's power to regulate in these areas.<sup>117</sup>

As for civil rights, the activity targeted by Title II occurs within the context of requests for commercial transactions: a potential customer seeks to rent a room in a hotel or purchase a meal in a restaurant, and this offer is rejected solely based on his race. Such discrimination is bound up with economic activity under the Roget's definition, and is thus “Commerce” for Article I, Section 8 purposes. Neither Justice Stevens's citation of *Heart of Atlanta Motel* and *McClung*, nor the editorial pages' insistence that Congress has power to enforce “civil rights,” therefore, justifies the ruling in *Raich*.<sup>118</sup>

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<sup>116</sup> *Id.* See also Bruce Fein, *Difficult Case, Right Decision*, WASH. TIMES, June 14, 2005, at A15 (criticizing Justice Thomas's position as extreme); *Joint Venture*, *supra* note 68, at 7 (“An unusual coalition of three justices—Sandra Day O'Connor, William Rehnquist, and Clarence Thomas—dissented from the ruling, suggesting that anti-regulatory forces on the Court remain strong.”). But see Editorial, *Unconstitutional Cannabis*, L.A. TIMES, June 7, 2005, at B12 (praising Justice Thomas and Chief Justice Rehnquist for intellectual integrity and blaming Congress for the result). As for *The New York Times*'s reference to elderly insecure retirements, this seems a red herring: Congress is not really regulating interstate commerce here; rather, it is providing for the general welfare through its spending and taxing powers. Some legal scholarship suggests that *Lopez* and *Morrison* wrongly recognize limits on Congress's commerce power because they would lead to the gutting of civil rights and environmental legislation. Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROBS. 53, 55–59 (2004); Susan N. Herman, *David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1205–06 (2004); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 376, 382 (2002).

<sup>117</sup> Pushaw echoes this point when he argues that his Neo-Federalist methodology “identifies clear rules of law that are rooted in the Commerce Clause's text and history, yet can be applied without dismantling the modern federal regulatory framework.” Pushaw, *supra* note 27, at 884.

<sup>118</sup> Part of the problem may be that liberals are “haunted by the ghost of Jim Crow.” Ryan Grim, *A Guide to Gonzales vs. Raich: What the Medical Marijuana Ruling Means for Patients, the Commerce Clause, Marital Sex, Antonin Scalia's Career and More*, SALON.COM, June 7, 2005, [http://dir.salon.com/story/news/feature/2005/06/07/supreme\\_court\\_and\\_pot/index.html](http://dir.salon.com/story/news/feature/2005/06/07/supreme_court_and_pot/index.html). The assumption appears to be that since Congress got it right and the states got it wrong on racial discrimination in 1964, federal law is, by definition, always right and state law, by definition, is always wrong anytime they conflict. Given the trend of the states and of other western liberal democracies on cannabis, however, this is not obviously correct. In any case, it is not a premise of American Federalism.

Beyond this, two points are in order on the subject of civil rights. First, it is doubtful that Congress is really concerned about civil rights enforcement. If it were, I submit that it would respond in one of two ways to *Crutcher v. Bollinger*, 539 U.S. 306 (2003), which allows the use of substantial racial preferences in the competition for scarce, valuable public resources by governmental institutions accepting federal funds, notwithstanding Title VI's express command of

As for labor, the editorial pages cite legitimate concerns about the exploitation of children and the accommodation of the disabled.<sup>119</sup> Again, however, the activity targeted when Congress regulates the conditions of labor is economic activity under the *Roget's* definition. It involves the compensated provision of services in which employer and employee both have financial motives.<sup>120</sup> Especially given the special protections for children throughout American law, child labor is well within Congress's regulatory authority, particularly where children are used for pornography.

As for environmental protection, finally, Professor Merrill observes that "[m]odern federal environmental legislation . . . enjoys widespread popular and political support, and is largely based on the commerce power."<sup>121</sup> Environmental legislation, in contrast to the CSA as applied in *Raich*, is plausibly based on that power. In *Hodel*, for example, Congress sought through the Surface Mining Control and Reclamation Act<sup>122</sup> to limit pollution and protect wildlife habitats. Since such mining activities are plainly motivated by financial profit, they can fairly be classified as economic activity under the *Roget's*-based definition.<sup>123</sup>

Even beyond the Commerce Clause, Article I, Section 8 arguably provides an independent source of congressional authority to enact federal environmental protection law: the "common Defence and

racial nondiscrimination. It would either reverse *Grutter* with respect to Title VI, or repeal Title VI's racial nondiscrimination rule as bad policy in light of *Grutter*.

Second, Congress's authority to enact and enforce racial nondiscrimination is distinct from the power to criminalize the private possession and medicinal use of cannabis. Beyond the fact that, unlike the CSA and the CUA, federal and state nondiscrimination laws no longer flatly conflict, as they have in the past, reasonable experts can disagree on the medicinal merits of cannabis and the very limited question of whether it should be rescheduled under the CSA. By contrast, all reasonable people agree that race is no basis on which to judge people. Unlike medicinal cannabis, there is no serious scientific disagreement about whether race determines intelligence, character, or humanity, and thus there is no scientific disagreement about whether one merits the protection of nondiscrimination law. Jim Crow laws were based on nothing but racial animosity, while medicinal cannabis laws (like the CUA) are based on compassion and the professional judgment of licensed physicians.

<sup>119</sup> American with Disabilities Act, 42 U.S.C. § 12,111(8)–(9) (2006).

<sup>120</sup> The propriety of requiring reasonable accommodations by employers, enabling the disabled, where possible, to work to make a living, is clear. It is thus difficult to see why it is not also sufficiently important to accommodate the sick and dying who seek, in order to preserve their lives, to consume privately what their doctors consider medicine, especially when no one, including the employer, is burdened by that activity.

<sup>121</sup> Merrill, *supra* note 42, at 842.

<sup>122</sup> 30 U.S.C. §§ 1201–1328 (2006).

<sup>123</sup> As for Congress's assertion of authority over "navigable waters" in statutes like the Clean Water Act, 33 U.S.C. § 1344(a) (2006), the Court has suggested that it seemed to be invoking its power to regulate the channels of interstate commerce, such that reliance on the substantial effects prong of *Lopez* and *Morrison* was not needed. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001) (avoiding reliance on the substantial effects test).

general Welfare" Clause.<sup>124</sup> This provision is often cited as a mere extension of the Spending Clause,<sup>125</sup> but two things must be noted. First, it was not so treated by Hamilton, whose vision of power being centralized in the national government is matched, if not exceeded, by that of the *Raich* majority.<sup>126</sup> Second, the ecosystem is our home, and the quality—indeed, the very possibility—of our lives requires its defense.<sup>127</sup> Laws aimed at protecting it are thus an exercise of the power to provide for "the common Defence."<sup>128</sup>

I conclude that neither the cases cited by Justice Stevens nor the concerns expressed in the editorial pages show that Congress must have power to imprison the likes of Diane Monson and Angel Raich in order to regulate civil rights, labor, and environmental protection. The activities targeted by such laws are not mere possession but are also economic activities under the Roget's-derived definition, and they are thus properly reachable under the commerce power and arguably under other Article I, Section 8 powers as well.

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<sup>124</sup> This clause provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and *provide for the common Defence and general Welfare of the United States . . .*" U.S. CONST. art I, § 8, cl. 1 (emphasis added). The Preamble, of course, also notes that one of the reasons for the Constitution is to "provide for the common Defence [and] promote the general Welfare," yet unlike the clause in Article I, Section 8, the Preamble is not an affirmative grant of power. U.S. CONST. pmbl.

<sup>125</sup> See, e.g., *Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) (imposing the "general welfare" clause as a limitation on the spending power); *Planned Parenthood v. Sanchez*, 403 F.3d 324, 329–30 (5th Cir. 2005) (citing all of Article I, Section 8, Clause 1 as the source of the spending power); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2575 (2005) (describing the "common defence" language as a source for the "superior capacity" theory of the federal spending power). This practice has a solid pedigree, as Madison notes that the phrase was transplanted into Article I, Section 8 from the Eighth Article of Confederation, where it clearly had reference to the payment of debts "incurred for the common defence & general welfare." See Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), in FEDERAL CONVENTION, *supra* note 55, at 483–87.

<sup>126</sup> See generally THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 1, at 26 (advocating for a strong national government); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 103 (1999) (discussing the "strong" Hamiltonian interpretation of an independent grant of power in the General Welfare Clause).

<sup>127</sup> Indeed, federal law provides that the purposes of the National Environmental Protection Act are, in part, "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . ." National Environmental Protection Act, 42 U.S.C. § 4321 (2006).

<sup>128</sup> By contrast, it is doubtful that Hamilton would have considered sick patients like Monson and Raich growing and consuming a plant for medicinal purposes in private a threat to "the common Defence." As Justice Thomas writes, "The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively." *Gonzales v. Raich*, 545 U.S. 1, 70 (2005) (Thomas, J., dissenting).

4. “*The Second Lopez Rule Is Not Really the Law.*” *Statutory Authority: Nuclear/Biological Weapons, Contraband Cigarettes, and Endangered Species*

Finally, Justice Stevens writes, “Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”<sup>129</sup> In support of this claim, he cites federal statutes<sup>130</sup> criminalizing possession of contraband cigarettes,<sup>131</sup> nuclear/biological weapons and plastic explosives,<sup>132</sup> and artifacts of endangered species.<sup>133</sup> In one sense, Stevens has a point. Unlike the civil rights, labor, and environmental laws just discussed, the statutes he now cites are similar to the CSA in that the mere “act” of possession is a federal crime in all cases.<sup>134</sup> With all these laws, furthermore, Congress seeks to suppress interstate markets that it legitimately seeks to destroy. Nonetheless, I assert that these laws do not establish Congress’s authority to imprison Monson and Raich and that Justice Stevens once again fails to give the second *Lopez* rule its due.

To begin, citation of these laws simply attempts to derive *ought* from *is*: In effect, says Justice Stevens, since Congress has ignored the second *Lopez* rule and thus far has gotten away with it, the rule does not exist. Yet this simply assumes what must be proven, i.e., that if challenged, these statutes would be sustained as exercises of Con-

<sup>129</sup> *Raich*, 545 U.S. at 26. Justice Stevens’s use of a key passage merits a close look. As he quotes from *Lopez*,

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

*Lopez*, 514 U.S. at 561 (footnote omitted).

Here is the thing to notice: Although Chief Justice Rehnquist’s conclusion follows immediately after, and thus rests on both premises in the first two sentences, Justice Stevens tries to make it seem as though it only rests on the second premise. Thus, even if the second premise is valid and satisfied in *Raich*, Justice Stevens simply writes as though the first premise, that possession is not commerce, is not there. He thus tears a unitary formulation in half to reach his result. Even if we concede the abstract proposition that Raich and Monson’s activity must be criminalized as an essential part of a larger regulation of economic activity, the CSA, as applied to the facts of *Raich*, does not criminalize economic activity. The first premise is not satisfied, and so Chief Justice Rehnquist’s argument provides no support for Justice Stevens’s conclusion.

<sup>130</sup> *Raich*, 545 U.S. at 26 n.36.

<sup>131</sup> See 18 U.S.C. § 2342(a) (2006) (regulating the trafficking of contraband cigarettes and smokeless tobacco).

<sup>132</sup> See *id.* §§ 175(a), 831(a), 842(n)(1) (relating to the regulation of biological weapons).

<sup>133</sup> See 16 U.S.C. § 668(a) (2006) (providing for the protection of bald and golden eagles). *The Washington Post* editorial expresses a concern in this area as well. See *Not About Pot*, *supra* note 113, at A20 (asking if Congress can protect an endangered species that exists only in a single state and may be wiped out by some noncommercial activity).

<sup>134</sup> See 21 U.S.C. § 841(a) (2006) (regulating the distribution, dispensation, or possession of controlled substances).

gress's commerce power. Especially since rulings by Chief Justice Roberts and Justice Alito, made while they were federal appellate judges, suggest that they take seriously the idea that Congress's commerce power is not unlimited,<sup>135</sup> this fails at a basic level to say anything persuasive to a future Court reconsidering this issue. Second, unlike cannabis, neither cigarettes, weapons, explosives, nor endangered species is considered life-preserving medicine by a substantial portion of the U.S. medical community (in the tradition of physicians throughout the world for millennia).<sup>136</sup> Third, none of these laws directly conflicts with state law, as in *Raich*. In none of these cases, that is, does federal law criminalize a type of possession expressly protected by state law.<sup>137</sup> For even further evidence that these laws do not justify the ruling in *Raich*, let us consider them individually.

To begin with Congress's power to criminalize possession of "contraband cigarettes," the statutory scheme in question<sup>138</sup> defines this term as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found."<sup>139</sup> As this suggests, Congress's purpose with this law was to protect state revenue. By stark contrast to the CSA, this ban on cigarette possession not only does not undermine state interests, *it supports and reinforces state interests*.<sup>140</sup> Since the law is also apparently intended to protect legal interstate markets for cigarettes (and thus the legitimate interests of legal cigarette vendors) from interstate black markets for cigarettes, Congress is clearly and legitimately exercising its commerce power with this law. Since the CSA seeks to destroy rather than protect the interstate market for cannabis, thus, Congress's power to enact 18 U.S.C.

<sup>135</sup> See, e.g., *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (indicating the power the Commerce Clause grants is not unlimited); *United States v. Rybar*, 103 F.3d 273, 286–94 (3d Cir. 1996) (Alito, J., dissenting) (noting the limited scope of Commerce Clause power).

<sup>136</sup> See *supra* note 25 (noting the medicinal uses of marijuana).

<sup>137</sup> Professor Merrill approves of the use of the rational-basis test in cases like *Raich*. Merrill, *supra* note 42, at 846–47. Contrary to Professor Merrill's endorsement, I submit that where federal law undermines state law, as the CSA does to the CUA, and the state law can pass the rational-basis test, as the CUA can, the federal law should prevail only if it survives strict scrutiny. Althouse, *supra* note 84, at 786–89; Barnett, *supra* note 29, at 747. Indeed, in *Morrison*, even Justices Souter and Breyer emphasized that the states supported the VAWA, yet they simply disregarded the glaring, inconvenient inconsistency of that fact with those in *Raich*. *United States v. Morrison*, 529 U.S. 598, 653, 703–04 (2000).

<sup>138</sup> 18 U.S.C. §§ 2341–2346 (2006).

<sup>139</sup> *Id.* § 2341(2).

<sup>140</sup> See *Morrison*, 529 U.S. at 653 (Souter, J., dissenting); *id.* at 703–04 (Breyer, J., dissenting) (both celebrating the confluence of federal and state interests as a hallmark of federal laws that should be upheld against Commerce Clause challenge).

§ 2342 provides no analog for its power to criminalize Monson and Raich's activity.<sup>141</sup>

Justice Stevens's second example of laws criminalizing mere possession are those governing biological weapons, plastic explosives, and nuclear materials. As with environmental laws, however, Congress's power to enact such laws is plausibly rooted in the Common Defense Clause. Indeed, this clause applies with added force here, since possession of such materials has no purpose other than to threaten public safety. Statutes criminalizing possession of such materials thus function not to regulate commerce, but to prevent mass physical attacks on the public, such as those experienced on 9/11. They plainly function to protect "the common Defence."

Finally, Justice Stevens references the Endangered Species Act of 1973 (ESA).<sup>142</sup> With this and related laws,<sup>143</sup> of course, Congress pursues not just a legitimate, but a compelling goal—that of conserving the ecosystem,<sup>144</sup> the web of life on which human life depends. As with the environmental and weapons and explosives laws, thus, Congress's power to enact such a law can plausibly be based on its authority to provide for "the common Defence." If that seems a stretch, it is far less a stretch than Justice Stevens's definition of economic activity, for the reasons given above.<sup>145</sup> After *Raich*, moreover, federal law protects endangered nonhuman species, while denying endangered humans what physicians widely consider life-saving medicine. Thus, even if we place non-human life *on a par* with human life, the CSA still embodies an absurd, irrational, indefensible inconsistency in our law.<sup>146</sup> It is hard to take seriously the claim that the need to suppress

<sup>141</sup> At a deeper level, this example illustrates again the absurdity of this part of the U.S. War on Drugs. In citing 18 U.S.C. § 2342 as an example of legitimate federal law, Justice Stevens supports the tobacco companies' interests in selling the most addictive, destructive drug on the planet, not something that physicians for millenia throughout the world, and since the 1850's in the U.S., have considered medicine. See *supra* note 25 (listing of sources that detailed the historical medicinal uses of marijuana).

<sup>142</sup> 16 U.S.C. §§ 1531–1544 (2006). See *supra* note 88, which celebrates *Raich* and its reliance on the comprehensive scheme principle to rule for Congress, since, in the author's view, this principle is the best way to uphold the ESA's take provision. See also Adler, *supra* note 24, at 775 (analyzing ESA in the context of the Commerce Clause). As much as I share Professor Adler's view that possession is properly not commerce for Article I, Section 8 purposes, even he does not address how Congress can protect endangered species without criminalizing possession.

<sup>143</sup> See, e.g., 16 U.S.C. § 703(a) (2006) (covering the possession of migratory birds).

<sup>144</sup> Among the purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ." *Id.* § 1531(b).

<sup>145</sup> See *supra* text accompanying notes 101–103.

<sup>146</sup> If there are reasons to justify such inconsistency, e.g., congressional findings that there are too few eagles and too many humans in the United States, they should be made explicit in the congressional record. Professor Parry assures us that biopolitics, of which the CSA and *Raich* are a part, is an aspect of the enlightenment project of reason. See John T. Parry, "Society Must be [Regulated]": *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 877 (2005) ("Indeed, biopolitics simply reflects the enlightenment project of promoting



the market for artifacts of dead animals justifies denying protection to living humans, especially where state law provides such protection.

While Justice Stevens does not expressly overrule the second *Lopez* rule, he simply ignores it and its underlying principle. Although Ar-

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reason in place of 'superstition' and arbitrary power." For the reasons presented, I reject this characterization. As Professor Pushaw adds, "ignor[ing] the language of the Commerce Clause . . . often inflicts serious real-world harms. For instance, after *Raich* no state may help its citizens who are enduring constant pain that can be relieved only through the controlled use of marijuana. It is precisely to allow such a state response to noncommercial social problems that the Commerce Clause contains the languages it does." Pushaw, *supra* note 27, at 912.

*Raich* thus answered the question whether federal marijuana law preempts contrary state marijuana law—it does. Yet it did not clarify whether the right claimed by Angel Raich is a fundamental right, and so she went back to federal court seeking a ruling to this effect. See *Raich v. Gonzales*, No. 03-15481, 2007 U.S. App. LEXIS 5834, at \*8 (9th Cir. Mar. 14, 2007) (stating that Raich argued that the CSA was unconstitutional because it infringed her fundamental rights protected by the Fifth and Ninth Amendments). The Ninth Circuit has now ruled against her on this claim, but it left open the possibility that she might qualify for the defense of necessity if she were criminally prosecuted. See *id.* at \*48 (holding that Raich's common law necessity defense is not foreclosed, but that the asserted right to use medicinal marijuana has not gained the traction on a national scale to be deemed fundamental); Jesse McKinley, *Dying Woman Loses Appeal on Marijuana as Medication*, N.Y. TIMES, Mar. 15, 2007, at A18 (noting that federal appellate judges had ruled against Raich). If the Supreme Court eventually recognizes the right claimed by Angel Raich as fundamental, then the drug war, or at least part of it, will be subject to strict judicial scrutiny. This is a sobering thought, for this part of the drug war can not even pass rational basis scrutiny.

To illustrate, *Roe v. Wade*, 410 U.S. 113 (1973), created a limited constitutional right to obtain an abortion, thus terminating innocent potential/likely human life. Whatever one's view of the law and morality of abortion, the harms caused by a sick patient consuming cannabis in the privacy of her home in order to ease her suffering and preserve her innocent actual human life cannot possibly be greater than those caused by abortion. Congress, accordingly, has no rational basis to deny the right claimed by Angel Raich while *Roe* (and *Casey*) remain the law.

As another illustration, federal law either regulates, or allows states to regulate, alcohol and tobacco. Notwithstanding the well-known harms from these substances, this is as it should be, for adults in a free society have the presumptive right to decide what shall be in the most private spaces of all, their bodies. Beyond its regulation of tobacco and alcohol, thus, federal law reflects this principle of presumptive adult bodily autonomy in other ways, such as an adult woman's right to decide whether she shall have a fetus inside her body and an adult man's right to decide whether he shall have another man's penis inside his body. There are justifiable exceptions to the principle in some contexts of course, like the laws governing smoking in restaurants, driving under the influence of alcohol, and using steroids in professional sports. Yet the presumption of bodily autonomy remains a basic feature of our law.

While alcohol and tobacco are thus properly regulated under our law, the private adult consumption of cannabis is completely prohibited, even on a doctor's recommendation for medicinal purposes under an otherwise valid state law. There is no remotely rational basis for such an inconsistency in the law. Although the government's interest in preventing harms from drunk-driving and second-hand smoke are compelling, its interest in preventing a sick patient from privately consuming doctor-prescribed medicine is not even legitimate, at least not in a society that retains basic decency. Nonetheless, while alcohol can legally be consumed in public it is a crime to consume cannabis even in private. This is not just an inconsistency in our law but one of an exponential nature for which, again, there is simply no rational basis. As for steroids, however important society's interest may be in fair professional sports competition, it is trivial compared to what Angel Raich has at stake.

I conclude that if the Court ever rules that Angel Raich has asserted a fundamental right, the drug war will begin to unravel, for this little corner of it, at least, cannot withstand even rational-basis scrutiny, nevermind the strict scrutiny a fundamental right would trigger.

title V reserves the amendment power for other constitutional actors, the *Raich* majority has in effect amended the Commerce Clause out of the Constitution. No matter how it tries to dress it up, its ruling is illegitimate and should be overruled.<sup>147</sup> If the Court can interpret a Constitutional provision, especially one as important as the Commerce Clause, to be without meaning, a written constitution is a sham. Chief Justice John Marshall's deceptively simple observation in *Marbury* thus rings true: "It can not be presumed that any clause in the constitution is intended to be without effect . . . . The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."<sup>148</sup>

#### IV. CONCLUSION

I have argued that while Justice Stevens's reasons for ruling for Congress in *Gonzales v. Raich* are understandable, he fails to respond to the force of the second *Lopez* rule and its underlying principle, making his decision ultimately indefensible and one that should be overruled at the first chance.<sup>149</sup> More immediately, however, it seems fitting and just that patients, doctors, caregivers, and law enforcement officials in states with medicinal cannabis laws have declared that *Raich* will have little or no impact on their day-to-day operations and procedures.<sup>150</sup> After all, states are required neither to assist with DEA

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<sup>147</sup> Thus, under a Neo-Federalist approach "the CSA should not have been upheld as applied to *Raich*, *Monson*, and others similarly situated." Pushaw, *supra* note 27, at 910. As Professors Reynolds & Denning add:

[I]n *Raich* the Supreme Court seems quite ready to abandon previous lines of jurisprudence without much concern for how it will affect its credibility. That's unfortunate, because the Court's backpedaling on the Commerce Clause is likely to have dramatic and damaging consequences for the Court's authority with the audience that watches it most closely, the lower federal courts . . . . *The judiciary is supposed to be about principle, not politics; at most, principle is supposed to be tempered by politics, not the other way around.*

Denning & Reynolds, *supra* note 22, at 918–21 (emphasis added).

<sup>148</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–76 (1803). As Professor Adler observes, the Court "displaced judicial review in favor of the political safeguards of federalism." Adler, *supra* note 24, at 762.

<sup>149</sup> See Barnett, *supra* note 29 (describing how a future Court might limit *Raich's* impact). As of this writing, Chief Justice John Roberts and Justice Samuel Alito both have seats on the Supreme Court. Based on Chief Justice Roberts's opinion in *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc), and Alito's opinion in *United States v. Rybar*, 103 F.3d 273, 286–94 (3d Cir. 1996) (Alito, J., dissenting), both seem to take seriously the judicial duty to enforce limits on national power imposed by the second *Lopez* rule. On the other hand, since both are thereby apparently trying to be faithful to controlling precedent, they may feel compelled to follow *Raich's* abandonment of the second *Lopez* rule. See Blumm and Kimbrell, *supra* note 88, at 497–98 (predicting that the latter is more likely, at least for Chief Justice Roberts).

<sup>150</sup> See, e.g., *Alabama's Medical Marijuana Advocate to Keep Trying*, ASSOCIATED PRESS, June 6, 2005; Eric Bailey, *Marijuana Patients Remain Defiant*, L.A. TIMES, June 7, 2005, at A20; Becky Bohrer, *McCrath: [Montana] Medical Marijuana Statute Still Valid*, ASSOCIATED PRESS, June 6, 2005; Alexandre Da Silva, *Ruling Unlikely to Change [Hawaii's] Marijuana Law*, ASSOCIATED PRESS,

harassment of sick patients nor to enforce federal prohibition in their courts, where ninety-nine percent of cannabis prosecutions occur. This broad reaction illuminates Congress's achievement, through its War on Drugs, of the status of an "irrelevant tyrant." This is a remarkable accomplishment, although Congress could not have done it without the DEA's and the Court's help.

It is true, we saw, that the number of House votes in favor of the States' Rights to Medical Marijuana Act has increased from 152 in 2003 to 163 in 2006.<sup>151</sup> Yet this bill would do nothing more than forbid raids and prosecutions under federal law in states with medicinal cannabis laws. It would not reassign cannabis to Schedule II under the CSA, much less allow States, under fair readings of *Gibbons*, *Lopez*, and *Morrison*, to go their own way on cannabis policy. Any congressional "progress" on this issue, in other words, is moving at a glacial pace at best. If reform momentum is not to be lost, States will have to continue their trend, along with Canada and many European countries, toward the more rational, less destructive policy of harm reduction.<sup>152</sup> If they do, Congress will eventually have to follow, contrary though such a scenario is to the theory of *Raich*.

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June 6, 2005; Dick Dahl, *Medical Marijuana Laws Going Up in Smoke*, ST. LOUIS DAILY REC., Aug. 6, 2006; Bob Egelko, *Medical Pot Users Say They Won't Stop*, S.F. CHRON., June 7, 2005, at A1; James Faulk & Chris Durant, *Hazy Outlook?*, TIMES-STANDARD (Eureka, Cal.), June 7, 2005; Paul Harasim, *For Nevada's Ill, No Changes*, LAS VEGAS REV.-J., June 7, 2005, at 6A; William McCall, *Supreme Court Medical Marijuana Ban Includes Oregon*, ASSOCIATED PRESS, June 7, 2005; Meghan Meyer, *Movement for Legalization of Medical Marijuana Pushes on*, COX NEWS SERVICE, Oct. 20, 2005; Dean E. Murphy, *Drug's Users Say Ruling Won't End Their Efforts*, N.Y. TIMES, June 7, 2005, at A21; Evelyn Nieves, *User of Medical Marijuana Says She'll Continue to Fight*, WASH. POST, June 7, 2005, at A8; Carol M. Ostrom, *Ruling Doesn't Affect State's Law on Medical Use of Pot*, SEATTLE TIMES, June 7, 2005, at A3; Meredith Pierce, *U.S. Supreme Court Decision on Medical Marijuana May Have Limited Effect*, CITY NEWS SERVICE, June 6, 2005; Wilson Ring, *Advocates Say Decision Means Little in Vermont*, ASSOCIATED PRESS, June 6, 2005; Ken Ritter, *Medical Marijuana Arrests Not Likely in Nevada, Officials Say*, ASSOCIATED PRESS, June 6, 2005; Elana Schor, *New Lobbying Group Presses for Medical Marijuana Use*, HILL, June 21, 2006, at 4; Natalie Storey, *N.M.'s Medical-Pot Advocates Won't Give Up*, SANTA FE NEW MEXICAN, June 7, 2005, at A3; Nicole Tsong, *For Alaska, Situation Status Quo, Officials Indicate*, ANCHORAGE DAILY NEWS, June 7, 2005, at A8; Elizabeth Zuckerman, *[Rhode Island] Senate Approves Medical Marijuana Bill*, ASSOCIATED PRESS, June 7, 2005. The lobbying group discussed by Schor is America for Safe Access (ASA), which has now sued the Department of Health and Human Services and the FDA over the federal government's claim that marijuana "has no currently accepted medical use in treatment in the United States." Citing a recent FDA-approved study, ASA claims that the government's statement is false and misleading, and it seeks a court order to retract and correct the statement. See Carolyn Marshall, *U.S. is Sued Over Position on Marijuana*, N.Y. TIMES, Feb. 22, 2007, at A17.

<sup>151</sup> See *supra* note 85.

<sup>152</sup> See, e.g., MacCoun & Reuter, *supra* note 8, at 265–99; see also Anita Hamilton, *This Bud's For the U.S.*, TIME, Aug. 23, 2004, at 36–37; McAllister, *Europe Goes to Pot*, TIME, Aug. 20, 2001, at 60–61.